Supreme Court, U.S.
FILED
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No. 99-150

IN THE

Supreme Court of the United States

WAL-MART STORES, INC.,

Petitioner,

v.

SAMARA BROTHERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

WILLIAM D. COSTON
Counsel of Record
KENNETH C. BASS, III
MARTIN L. SAAD
VENABLE, BAETJER, HOWARD & CIVILETTI, L.L.P.
1201 New York Avenue, N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4800

Attorneys for Petitioner

STUART M. RIBACK
Counsel of Record
FRED M. WEILER
SILLER WILK LLP
747 Third Avenue
New York, NY 10017
(212) 421-2233

Attorneys for Respondent

Petition for Writ of Certiorari Filed July 20, 1999
Certiorari Granted October 4, 1999

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-CV-5032

SAMARA BROTHERS, INC.,

v.

JUDY-PHILIPPINE, INC., *et al.*

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
7/2/96	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $120.00 RECEIPT # 266060 (ba) [Entry date 07/05/96]
7/9/96	4	UNSIGNED ORDER TO SHOW CAUSE by Samara Brothers, (See doc. for more information) (ae) [Entry date 07/11/96]
7/9/96	4	Memo endorsed on Order to Show Cause; , Application GRANTED to the extent set forth on the record on 7/3/96. SO ORDERED: (signed by Judge Denny Chin) (ae) [Entry date 07/11/96]
7/10/96	5	MEMORANDUM OF LAW by Samara Brothers, in support of an Order Restraining Further Sales of Infringing

DATE	NR.	PROCEEDINGS
		Goods. (ae) [Entry date 07/15/96] [Edit date 09/22/97]
7/11/96	6	MEMORANDUM by Samara Brothers in support of [4-1] motion. (See doc. for more information) (kw) [Entry date 07/12/96] [Edit date 09/22/97]
7/12/96	14	DECLARATION of Barbara L. Waite by Wal-Mart. (ae) [Entry date 07/15/96] [Edit date 09/22/97]
7/12/96	15	MEMORANDUM OF LAW by Wal-Mart Stores, Inc in opposition to Motion for a TRO and a Preliminary Injunction. (ae) [Entry date 07/15/96] [Edit date 09/22/97]
7/24/96	24	AMENDED COMPLAINT by Samara Brothers, amending [1-1] complaint (kk)
8/19/96	33	ANSWER by Wal-Mart Stores, Inc (Attorney Edward F. Glynn) to amended complaint; jury demand; Firm of: Venable, Baetjer, Howard & Civ by attorney Edward F. Glynn for defendant Wal-Mart Stores, Inc (kg) [Entry date 08/22/96]
8/19/96	33	COUNTERCLAIM by Wal-Mart Stores, Inc against Samara Brothers, (kg) [Entry date 08/22/96]

DATE	NR.	PROCEEDINGS
8/19/96	33	CROSSCLAIM by Wal-Mart Stores, Inc against Samara Brothers, (kg) [Entry date 08/22/96]
9/10/96	37	Transcript of record of proceedings filed before Judge Chin for dates of 7/15/96 at 9:30 a.m. (ae)
2/3/97	50	MOTION by Wal-Mart Stores, Inc for judgment pursuant to FRCP 50, or, in the alternative, for a new trial pursuant to FRCP 59., (ae) [Entry date 02/05/97]
2/3/97	51	MEMORANDUM by Wal-Mart Stores, Inc in support of [50-1] motion for judgment pursuant to FRCP 50, [50-2] motion for a new trial pursuant to FRCP 59. (ae) [Entry date 02/05/97]
2/13/97	52	CONSENT ORDER, STIPULATED AND AGREED BY AND BETWEEN PARTIES AS FOLLOWS: 1) Plaintiff Samara Brothers, Inc. ('Samara") commenced this action on 7/2/96, alleging trade dress and copyright infringement with respect to certain garments manufactures and sold by dft. Judy Philippine, Inc. ("JPI"), and offered for resale and sold by dft. Hills Dft. Stores, Inc. ("Hills"), The Caldor Corp. ("Caldor") . . . . . etc . . . . . 2) On July 3, 1996 this Court issued and order, with the consent of JPI,

DATE	NR.	PROCEEDINGS
		temporarily restraining JPI from manufacturing, seeling, importing, displaying or engaging in commerce in allegedly infringing garments. 3) Trial of this matter is set for 1/6/97. Discovery is to close 12/13/97 . . . . . (see order) . . . . . So Ordered . . . . (signed by Judge Denny Chin); (pl) [Entry date 02/14/97]
2/14/97	53	REPLY by Wal-Mart Stores, Inc. in OPPOSITION to pltff Samara Brothers, Inc.'s Motion for Injunctive & other post-trial relief (motion no filed) (lam) [Entry date 02/19/97]
2/14/97	53	AFFIDAVIT of Barbara L. Waite, atty for Wal-Mart Stores, Inc in SUPPORT of [53-1] motion response (lam) [Entry date 02/19/97]
2/21/97	56	REPLY MEMORANDUM of LAW by Samara Brothers, re: in Further Support of Injunctive and other Post Trial Relief. (djc) [Entry date 02/24/97]
2/28/97	58	Transcript of record of proceedings filed for dates of January 6-10, 1997 before Judge Chin. (kw)
3/31/97	59	SUPPLEMENTAL BRIEF by Wal-Mart Stores, Inc re: in opposition to pltff's proposed injunctive relief (emil) [Entry date 04/01/97]

DATE	NR.	PROCEEDINGS
6/6/97	63	NOTICE OF SUPPLEMENTAL MOTION by Wal-Mart Stores, Inc, SUPPLEMENTING: [50-1] motion for judgment pursuant to FRCP 50, and [50-2] motion for a new trial pursuant to FRCP 59. ; (kw) [Entry date 06/09/97]
6/17/97	64	PLAINTIFF'S SUPPLEMENTAL POST-TRIAL MEMORANDUM OF LAW in response to supplemental submission of defendant Wal-Mart, Inc. (ae)
7/17/97	66	JUDGMENT # 97,1498, ORDERED ADJUDGED AND DECREED that: for PERMANENT INJUNCTION against Wal-Mart hereby enjoined from infringing any of the following valid registered copyrights owned by Samara: VA 751-717 - VA 751-726, VA 768-792, VA 768-793 and VA 768-841.; Samara shall recover of Wal-Mart the sum of $1,584,187. (signed Judge Denny Chin); Mailed copies and notice of right to appeal. (ae) [Entry date 07/18/97]
7/22/97	68	ORDER denying [50-2] motion for a new trial pursuant to FRCP 59 and for judgment as a matter of law plntf motion for injunctive relief and attys' fees is granted as set forth within

DATE	NR.	PROCEEDINGS
		(signed Judge Denny Chin); Copies mailed (cd) [Entry date 07/23/97]
7/24/97	69	NOTICE OF APPEAL by Wal-Mart Stores, Inc; from [66-1] judgment order. Copies of notice of appeal mailed to Attorney (s) of Record: Marya Lenn Yee, Stuart Mark Riback. $105.00 Fee paid on receipt # E 293203. (dt) [Entry date 07/29/97]
8/14/97	73	NOTICE OF APPEAL by Wal-Mart Stores, Inc; from [66-1] judgment order. Copies of notice of appeal mailed to Attorney (s) of Record: Marya Lenn Yee, Stuart Mark Riback. $105.00 Appeal filing fee paid on receipt # E 294797 on 08/14/97. (dt)
8/14/97	74	JOINT PRETRIAL ORDER filed (signed by Judge Denny Chin) (ae) [Entry date 08/15/97]
8/18/97	75	Proposed Voir dire questions and Proposed Jury Charges by Wal-Mart Stores, Inc. . Affidavits of Attempted Service upon Joseph Safdieh c/o Judy Philippine and Alan Safdieh c/o Judy Philippine of Subpoenas in a Civil Case. (pl) [Entry date 08/20/97] [Edit date 09/22/97]
9/15/97	80	NOTICE OF MOTION by Samara Brothers, for an order that the judgment

DATE	NR.	PROCEEDINGS
		under FRCP 54(b) be entered in this action: (a) enjoining Wal-Mart from infringing Samara's current and future copyrights; (b) enjoining Wal-Mart from infringing Samara's trade dress in its Spring/Summer seersucker line; (c) add together the elements of profit awarded by the jury on the separate copyright and trade dress counts because they relate to different infringements; (d) increase Samara's recovery above the amount awarded by the jury, to account for post-July 13, 1996 profits illegitimately earned by Wal-Mart; (e) award Samara pre-judgment interest on the amount awarded to it by the jury; (f) award Samara its attorneys fees under both the Lanham Act and New York Gen. Bus. L. § 3490; with affidavit in support attached. (ae) [Entry date 09/16/97]
10/22/97	84	Filed Memo-Endorsement on letter to Judge Chin from Stuart M. Riback dated 9/29/97; granting Samara Brothers request that Judge Chin advise the Clerk of the Court that the attached forms of jdgmt. should be placed in the Court's file and made part of the record on appeal. These documents shall be docketed as unsigned proposed jdgmts.; (signed by Judge Denny Chin) (ls) [Entry date 10/23/97]

DATE	NR.	PROCEEDINGS
10/22/97	85	Alternative Form of Proposed Judgment by Samara Brothers, Inc. (unsigned) (ls) [Entry date 10/23/97] [Edit date 10/24/97]
10/22/97	86	Proposed Jdmgt. by Samara Brothers, Inc. (unsigned) (ls) [Entry date 10/23/97] [Edit date 10/24/97]
10/22/97	87	Proposed Judgment by Samara Brothers; (unsigned) (ls) [Entry date 10/24/97]
11/3/97	88	Transcript of record of proceedings before Judge Chin filed for dates of July 14, 1997 (pl) [Entry date 11/06/97]
4/30/98	89	MANDATE OF USCA (certified copy) Re: [73-1] appeal by Wal-Mart Stores, Inc. It is now ordered, adjudged and decreed that the judgment of said district court be and hereby is affirmed in part, reversed in part, and case is remanded to said district court for further proceedings. Attached statement of costs taxed in the amount of $725.35 in favor of appellee, Samara Brothers, Inc. (97-7933, 97-9003) Carolyn Clark Campbell, Clerk, USCA. *(Docket as a Judgment #99,1017 on May 5, 1999)*. (as) [Entry date 05/03/99] [Edit date 05/05/99]

DATE	NR.	PROCEEDINGS
7/6/99	90	JUDGMENT #99,1527, that deft Wal-Mart is hereby enjoined from infringing any of the following valid registered copyrights owned by Samara: VA 751-717 through VA 751-726, VA 768-792 and VA 768-793 and VA 768-841. Wal-Mart is hereby enjoined from infringing any other copyright that Samara registered or may register in the future as further set forth in this document. Samara shall recover of Wal-Mart the sum of $1,676,995.77, as further set forth in this document (signed by Judge Denny Chin); Mailed copies and notice of right to appeal. Entered on the docket on 7/7/99 (cd) [Entry date 07/07/99}

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 97-7933

SAMARA BROTHERS, INC.,

v.

WAL-MART STORES, *et al.*

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
7/31/97	Copy of district court docket entries and notice of appeal on behalf of Appellant Wal-Mart Stores filed [97-7933] Form C due on 8/4/97. Form D due on 8/4/97. (cv71) [97-7933]
6/9/98	Case heard before NEWMAN, PARKER C.JJ., CARMAN USCIT (TAPE: #41+42) (CA95) [97-7933]
12/28/98	Judgment of the district court if AFFIRMED in part, REVERSED in part, and REMANDED by published signed opinion filed (FIL). [97-7933] (cv78) [97-7933]
12/28/98	Judge John O. Newman DISSENTING in a separate opinion filed. (cv78) [97-7933]
12/29/98	Judgment filed. (cv78) [97-7933]

DATE	PROCEEDINGS
1/11/99	Appellant Wal-Mart Stores in 97-7933 Petition for rehearing, petition for rehearing en banc [1337350-2] with proof of service filed. (cv78) [97-7933]
4/21/99	Order FILED DENYING petition for REHEARING [1337350-1] by Appellant Wal-Mart Stores, endorsed on motion dated 1/11/99, and DENYING petition petition for rehearing in banc [1337350-2] by Appellant Wal-Mart Stores, endorsed on dated 1/11/99. (cv78) [97-7933]
4/28/99	Judgment MANDATE ISSUED. (cv78) [97-7933]
9/20/99	Letter from Judge Carman advising that he had learned that his wife owns stock in Wal-Mart and that he is exercising his obligation of recusal, received. (cv78) [97-7933]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

v.

JUDY-PHILIPPINE, INC., K MART CORPORATION,
THE CALDOR CORPORATION, WAL-MART STORES, INC.,
HILLS DEPARTMENT STORES, INC.,
GOODY'S FAMILY CLOTHING, INC.,
and JOHN DOES 1-50,
Defendants.

Amended Complaint

Plaintiff Samara Brothers, Inc., by and through its attorneys, Siller Wilk LLP, for its Complaint herein alleges as follows:

Jurisdiction and Venue

1. By this Complaint, Samara Brothers, Inc. seeks injunctive relief and damages based upon claims for relief for copyright infringement arising under 17 U.S.C. § *et seq*., and for trade dress infringement under 15 U.S.C. § 1125, deceptive acts and practices under N.Y. Gen. Bus. Law § 349 and the New York common law of unfair competition.

2. The Court has jurisdiction of this action pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1334(b), and 1338(a).

3. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), 1400(a) and 1409(a) and (e).

The Parties

4. Samara Brothers, Inc. ("Samara") is a corporation organized and existing under the laws of the State of Delaware, with an office and place of business at 112 West 34th Street, New York, New York.

5. Defendant Judy-Philippine, Inc. ("Judy") is a corporation headquartered within this district, with offices located at 1333 Broadway, New York, New York.

6. Defendant K Mart Corporation ("K Mart") is a corporation incorporated under the laws of Michigan. Its principal place of business is in Troy, Michigan. K Mart does business in this State and this district.

7. Defendant The Caldor Corporation ("Caldor") is a corporation organized and existing under the laws of Delaware. It regularly does business in this State and this district. Caldor is a debtor in a Chapter 11 case currently pending before this Court, and all acts alleged in this Complaint occurred after the commencement of its Chapter 11 case.

8. Defendant Wal-Mart Stores, Inc. ("Wal-Mart") is incorporated under the laws of Delaware. Wal-Mart's principal place of business is in Bentonville, Arkansas. Wal-Mart does business in this State and this district.

9. Defendant Hills Department Stores, Inc. ("Hills") is a corporation duly organized and existing under the laws of Delaware. Hill's principal place of business is in Canton, Massachusetts. Hills does business in this State and this district.

10. Defendant Goody's Family Clothing, Inc. ("Goody's") is a corporation duly organized and existing under the laws of Tennessee. Its principal place of business is in Knoxville, Tennessee. Goody's does business in this State and this district.

11. Defendants John Does 1-50 are domestic corporations, partnerships and/or other business entities with principal places of business in the United States and who do business in this State and this district.

Background

12. Clothing has been sold under the Samara name for about 50 years. Over the last decade, Samara has become particularly well known for its line of summer clothing for small children including sundresses, sundress sets, creepers, bubbles, shortall sets, and shortalls. Samara has spent, and continues to spend, large amounts of money and effort in designing, developing, marketing and promoting its line of children's spring and summer wear. The spring/summer line is Samara's single biggest selling line, and is the line of clothing for which Samara is best known.

13. Samara has developed a consistent, uniform "look" for its spring/summer line. The "look" is consistent across the entire line, and the look has become associated with Samara's name. Because of the unique and consistent look, it is possible to identify Samara goods from scores of feet away, without looking at (or even being able to see) hang-tags or labels. The Samara "look" is immediately recognizable to consumers and to members of the retail trade.

14. The Samara look consists of a combination of features that, taken together, give the childrenswear a clean, bright, classic and uncluttered appearance. Specifically, the Samara look includes the following:

- a "clean"uncluttered appearance;
- carefully coordinated combinations of silhouettes, applique designs, fabric patterns and colors;

- placement of the appliques on the garment in order to produce a unified appearance, often by integrating the appliques into the collar and/or the pockets;
- conservative, classic styling that remains consistent from year to year rather than changing with fashion; and
- specially designed stylized appliques selected for consistency across the line.

15. Pursuant to Title 17 of the United States Code, Samara has applied for and obtained copyrights for certain of its appliques and designs. All or some of the artwork for the eighteen garments at issue in this case has been registered with the copyright office; the registration numbers for the copyrights are VA 751-717 through 751-726; VA 768-792 through 768-794; VA 768-826; VA 768-827; VA 768-841; VA 768-842; and VA 720-956.

Defendants' Infringement of Samara's Copyrights and Trade Dress

16. In early June, 1996, Samara received a telephone call from one of its customers demanding to know why Samara's spring/summer line clothing was being sold in Wal-Mart at a retail price comparable to the price Samara charged at wholesale. The short answer was that Samara clothing was *not* being sold in Wal-Mart. As a result of this telephone call, Samara undertook an investigation to ascertain what accounted for the customer's belief that Samara's childrenswear was being sold in Wal-Mart.

17. Samara's investigation brought to light that Judy has manufactured an entire line of children's clothing that is virtually identical in appearance to Samara's products. Judy's goods are almost perfect copies of Samara's. Samara's look has

been purloined, as have the details of the look, including its designs, appliques and placement of appliques.

18. Although the knockoffs manufactured by Judy appear almost exactly like the originals designed and manufactured by Samara, the quality of the Judy products is noticeably lower.

19. Judy's pirated products are being sold under the "Cuties by Judy" and "JPI" labels in stores operated by K Mart, Wal-Mart, Caldor, Hills and Goody's.

20. In addition, Wal-Mart is offering pirated goods for sale under Wal-Mart's private label, "Small Steps." On information and belief, Judy has manufactured the "Small Steps" garments for Wal-Mart.

21. Furthermore, on information and belief, Judy's salesmen in Judy's New York showroom are showing to buyers garments identical to Samara's and representing these goods as part Judy's 1997 spring/summer line. On information and belief, Judy's planned 1997 Spring/Summer line consists in large part (and possibly predominately) of knockoffs of Samara's products.

22. Upon learning of the foregoing activities, Samara immediately made a formal written demand upon Judy, Caldor, K Mart and Wal-Mart on June 14, 1996 that, among other things, they immediately cease and desist their infringing activities and account to Samara for the gains garnered by sales of the infringing goods. Samara's written demand required Judy, Caldor, K Mart and Wal-Mart to respond by June 21, 1996. At the request of Judy, the time for response was extended to June 26, 1996.

23. Several days after learning of the infringement by Judy, Wal-Mart, K Mart and Caldor, Samara learned that Judy's knockoffs were also being sold in Hills and Goody's. By letter

of June 20, 1996, Samara made a similar written demand upon Hills and Goody's, demanding response by June 26.

24. None of the defendants have responded satisfactorily.

First Claim for Relief
(For injunctive relief under 17 U.S.C. § 502)

25. Samara repeats and realleges the allegations of paragraphs 1 through 23 as though fully set forth herein.

26. Samara is the owner of certain artwork used as designs for appliques and garments, which is original and copyrightable subject matter under the copyright laws of the United States, 17 U.S.C. §101 *et seq*.

27. Samara has duly complied with the provisions of title 17 of the United States Code and has secured rights and privileges in and to its wholly original artwork used as designs for fabric and garments, and Samara has duly requested from the Registrar of Copyrights Certificates of Registration pertaining to said designs. Samara has obtained such certificates, identified as follows: VA 751-717 through 751-726; VA 768-792 through 768-794; VA 768-826; VA 768-827; VA 768-841; VA 768-842; and VA 720-956.

28. On information and belief, Judy has deliberately copied Samara's design, appliques and artwork. Judy manufactures, imports and has sold and continues to sell garments in violation of Samara's exclusive rights under Title 17 of the United States Code. Furthermore, Judy threatens to copy and sell as its own yet additional designs and garments bearing Samara's proprietary designs and artwork. Unless restrained by this Court, Judy will continue to copy, manufacture, import and sell goods pirated from Samara in violation of Samara's exclusive rights under Title 17 of the United States Code.

29. On information and belief, Wal-Mart has deliberately infringed Samara's designs, appliques and artwork. Wal-Mart has contracted for the manufacture of garments for its own private label, "Small Steps," in violation of Samara's exclusive rights under Title 17 of the United States Code. Unless restrained by this Court, Wal-Mart will continue to have manufactured goods pirated from Samara in violation of Samara's exclusive rights under Title 17 of the United States Code.

30. K Mart, Wal-Mart, Caldor, Hills and Goody's have sold, continue to sell, and unless restrained by the Court, will continue to sell childrenswear bearing Samara's proprietary artwork in violation of Title 17 of the United States Code. Defendants have not obtained from Samara consent, license or permission for such sales.

31. Samara has no adequate remedy at law.

Second Claim for Relief
(for injunctive relief under 17 U.S.C. § 502)

32. Plaintiff repeats and realleges the allegations of paragraph 1 – 31 as though fully set forth herein.

33. The systemic nature of Judy's copying raises the spectre that Judy will continue in the future to copy Samara's designs, both those currently in existence and copyrighted and those that will be created and copyrighted in the future.

34. Judy should be restrained from copying any designs of Samara that may be created both now and in the future.

35. Samara has no adequate remedy at law.

Third Claim for Relief
(Damages for copyright infringement
under 17 U.S.C. § 504)

36. Plaintiff repeats and realleges the allegations of paragraph 1 – 35 as though fully set forth herein.

37. Defendants have sold children's garments bearing Samara's copyrighted designs and artwork in violation of Samara's exclusive rights under Title 17 of the United States Code, including but not limited to 17 U.S.C. §106. All sales by defendants of the subject items are without license, permission or consent of Samara.

38. Samara is entitled to its actual damages and to all profits that defendants have improperly gained from their infringement of Samara's rights.

Fourth Claim for Relief
(Trade Dress Infringement
under 15 U.S.C. § 1125
for injunctive relief)

39. Samara repeats and realleges the allegations of paragraphs 1 through 38 as though fully set forth herein.

40. Samara over the past decade has developed a line of children's spring and summer clothing bearing a unique combination of colors, appliques, silhouettes and other design elements that unite to create a distinctive Samara look. The Samara look is readily identifiable and well-known to buyers of children's spring/summer clothes, particularly to members of the national trade who make buying decision for stores.

41. Samara has spent and continues to spend substantial sums to develop, design and promote Samara's line of children's spring/summer wear. The distinctive look of Samara's spring and summer childrenswear line is one of

Samara's greatest assets. The line of children's seersucker spring/summer clothes at issue herein is Samara's single biggest selling line, and is the line of clothing for which Samara is best known.

42. Judy [illegible] Wal-Mart have copied at least eighteen separate designs of Samara for children's seersucker spring and summer wear, all of which exhibit the distinctive Samara look which is common to the whole line. Judy has sold the infringing garments to the other defendants, who have sold and are continuing to sell the infringing garments to the unsuspecting public. Wal-Mart also has sold and is continuing to sell infringing garments under its private label.

43. Defendants' infringement of Samara's distinctive trade dress has caused actual confusion and is likely to continue to cause confusion in the marketplace. In addition, the clothing sold by Judy and its customers and by Wal-Mart is of noticeably inferior quality to the clothing manufactured and sold by Samara. The misuse by defendants of Samara's "look" has misled buyers and will continue to mislead buyers into believing defendants are selling Samara clothing when in fact they are selling only Judy's or others' inferior quality "knockoffs". The confusion is also likely to injure Samara's reputation for high-quality goods, since the Judy knockoffs are of noticeably inferior quality.

44. Samara did not consent or grant permission or license to defendants to use the Samara look in the clothing they are selling.

45. Unless restrained, defendants will continue to cause confusion in the minds of the public as to the source of their goods by selling Samara lookalikes that did not originate from Samara, and will likewise cause injury to Samara.

46. Plaintiff has no adequate remedy at law.

Fifth Claim for Relief
(Damages under 15 U.S.C. § 1125)

47. Plaintiff repeats and realleges the allegations of paragraph 1 – 46 as though fully set forth herein.

48. By selling knockoffs of Samara's look, defendants have taken for themselves the fruits of Samara's efforts, deprived Samara of sales and gained unearned profits. Defendants should be required to compensate Samara for its injuries and to disgorge their ill-gotten profits.

Sixth Claim for Relief
(Deceptive acts and practices under
N.Y. Gen. Bus. Law § 349)

49. Samara realleges and incorporates by reference the allegations set forth in paragraphs 1 through 48 of this Complaint.

50. Samara is the owner of certain artwork, appliques and designs used in its line of children's clothing.

51. Defendants' sale to the public of copies of Samara's goods, passing them off as their own, constitutes a deceptive act and practice.

52. On information and belief, Judy and Wal-Mart wilfully and knowingly copied Samara's goods and passed them off as their own. Judy and Wal-Mart continue to knowingly and wilfully engage in such deceptive acts and practices. The other defendants have been advised of Samara's rights in the designs and artwork of the garments, but wilfully and knowingly continue to engage in such deceptive acts and practices. Such actions have injured Samara.

53. Defendants should be required to pay Samara's actual damages pursuant to § 349(h), plus reasonable attorneys fees.

Seventh Claim for Relief
(Common law unfair competition)

54. Plaintiff repeats and realleges the allegations of paragraphs 1 – 53 as though fully set forth herein.

55. Judy and Wal-Mart have copied Samara's styles, designs and artwork and are selling it as their own. Despite having been informed of such improper copying, Wal-Mart, K Mart, Hills, Caldor and Goody's continue to sell Judy's garments, thereby unfairly competing with Samara. Wal-Mart is also selling such garments under its own house brand. The sale of such knockoff garments is an unjustified misappropriation by defendants of Samara's time, labor, talent and investment.

56. Defendants should be required to pay damages to Samara and account for their ill-gotten gains.

WHEREFORE, Samara prays for judgment as follows:

A. On the first claim, enjoining defendants from infringing plaintiff's copyright;

B. On the second claim, enjoining Judy from infringing plaintiff's copyrights and future copyrights;

C. On the third claim, awarding Samara actual damages and defendants' profits for defendants' infringement of Samara's copyright;

D. On the fourth claim, enjoining defendants from infringing plaintiff's trade dress by selling goods bearing Samara's distinctive look;

E. On the fifth claim, awarding plaintiff damages for defendants' infringement of plaintiff's trade dress;

F. On the sixth claim, awarding plaintiff damages for defendants' deceptive acts and practices;

G. On the seventh Claim, an award of damages and defendants' profits for their unfair competition with plaintiff;

H. An accounting by defendants of all sales and inventory of infringing goods, and all profits garnered therefrom;

I. Interest, costs and attorneys fees to the extent permitted or required by law; and

J. Such other and further relief as may seem just and proper to the Court.

Dated: New York, New York
July 22, 1996

SILLER WILK LLP

By: /s/ Stuart M. Riback
Stuart M. Riback (SR-2443)
747 Third Avenue
New York, NY 10017
(212) 421-2233

Attorneys for Plaintiff
Samara Brothers, Inc.

[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

v.

JUDY-PHILIPPINE, INC., K MART CORPORATION,
THE CALDOR CORPORATION, WAL-MART STORES, INC.,
HILLS DEPARTMENT STORES, INC.,
GOODY'S FAMILY CLOTHING, INC.,
and JOHN DOES 1-50,
Defendants.

January 6, 1997
10:00 a.m.

Before: HON. DENNY CHIN,
District Judge

APPEARANCES

SILLER WILK LLP
Attorneys for Plaintiffs
BY: ALLEN G. REITER
STUART M. RIBACK

VENABLE, BAETJER, HOWARD & CIVILETTI LLP
Attorneys for Defendants
BY: WILLIAM D. COSTON
BARBARA L. WAITE

[25] Riback - opening

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Trade dress. Trade dress is related to trademarks. You may have heard of that term. The term trademark refers to any word, symbol, device or any combination thereof adopted and used by a manufacturer or merchant to identify its goods and to distinguish its goods from goods manufactured or sold by others. The term trade dress refers to the total look or image of a product and includes color schemes, textures, sizes, designs, shapes, words, placement of words, graphics or decorations on a product or its packaging.

[26] The function of trademarks or trade dress is to designate goods as a product of a particular manufacturer or merchant and to protect that particular manufacturer or merchant's good will against the sale of another company's product as the first manufacturer or merchant. Again I will give you further instructions on these concepts later on but I wanted to give us just an idea about them.

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[30]

You will hear a number of witnesses talking about how every garment in the seersucker line has to have a Samara look. It has to be clean and bright without a lot of lace and frills and bows. It's very traditional, very classic.

There are certain themes and styles that only Samara does and that Samara does year in and year out year after year to the point that people can know that a certain type of dress is a Samara just from looking at it even without looking at a label.

Let me give you two examples.

There is a large scalloped collar with three appliques dropped into the edge of the collar and integrated in to the collar's construction and I will show you from the 1995 line three examples. Here you have the scalloped collar with the three appliques dropped into the construction of the scalloped collar just like that. Again over here, this one was a strawberries number 4 and this one over here, number 6, the same idea, scalloped collar, but it's done with hearts. Here again is the scalloped collar and what they have done is worked the flowers and the leaves into the construction of the garment.

THE COURT: What exhibit number is the last one?

MR. RIBACK: 4A, 6A, and 5A.

THE COURT: Alright.

[31] MR. RIBACK: That was the `95 line. But let me show you the `96 line. Scalloped collar, three different appliques, a different looking dress but the same look, the scalloped collar with three appliques dropped into the edges of the construction work of the collar with the tulip-like flower. It's done with a different kind of strawberry. This one is my personal favorite, teddy bears, or with sailboats.

Another theme they developed is ric rac about a quarter of the way up from the edge of the collar and about a quarter of the way down from the pocket with an applique on either edge of the collar and an applique on either pocket. The `95 example we have here is 1A. The ric rac is about a quarter of the way up with the contrasting collar and about a quarter of the way down, applique, applique. That is the `95 version. Here is the `96 version. These are just examples. The line is much broader but these are examples. Here it's done with hearts. Here it's ladybugs, and this one was popular so they are doing it again.

They are doing it again for `97. I can go through the exercise again with the scalloped collars here with the nice little

heart-shaped boat dropped into the scallop or with cherries or with watermelons. I can do the ric rac with cherries, with double hearts, with tulips.

No one else in the industry does that type of [32] style. These are two examples of the types of things that Samara does. Nobody else does that. Nobody did anyway until Wal-Mart started doing it when they tried to move in and take Samara's styles and designs away without paying for them, and Wal-Mart made over $1 million in `96 for doing that.

* * * *

[46] Jones - direct

Q. Ms. Jones, on the day you went to the Wal-Mart store, did you go with a particular purpose in mind?

A. Yes, I did.

Q. Could you tell the jury what that purpose was?

A. To look for garments that looked like Samara product.

[47] Q. And did you accomplish that mission?

A. Yes, I did.

Q. And what did you do when you saw these garments?

A. I purchased the garment, as one of each style of what I found and on that occasion, I found at least two or three and I went to several Wal-Mart stores.

Q. Now, let me direct your attention to the date --

THE COURT: I'm sorry. You found two or three?

THE WITNESS: Per Wal-Mart store.

THE COURT: Per Wal-Mart store?

Q. All together how many different garments did you purchase?

A. On that day, approximately 12.

Q. Let me direct your attention now to the day before you made that survey of Wal-Mart stores. Do you recall the day before?

A. I don't remember if it was specifically the day before, but, yes, I think I believe the day you're asking about.

Q. What was the longest period of time it could have been before the day --

A. A week, at most.

Q. Do you recall receiving a telephone call from a person employed by J.C. Penney's?

A. Yes, I do.

[48] Q. And where were you when you received that call?

A. I was in my office.

Q. And could you tell us what that person said to you and what you said to that person?

A. The person was a buyer from J.C. Penney and she had called -- she had been in a Wal-Mart store and had -- she said she saw our product at a lower price than what she could retail our product for.

Q. And what was your reaction to being told that by her?

A. I told her it wasn't our product and that we didn't supply Wal-Mart and that to my knowledge, it wasn't anything like our product.

Q. Did you do anything about that conversation after it was concluded?

A. I called my supervisor who was in New Jersey and told him about the conversation.

Q. Could you tell us that person's name?

A. Don Gaffney.

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[53] Jones - cross

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Q. How did you find children's apparel?

A. There's a sign over it. It says "Children's."

Q. Now, when you walked to the particular spot where you found the garments, could you describe how they were displayed within the store?

A. On apparel racks.

Q. And could you help us by describing what an apparel rack is?

A. There's different types of apparel racks. There's some that just have two arms. Some have four arms. Some have round rings.

Q. And do you recall the first Wal-Mart store you went to, what kind of apparel rack it had?

A. I couldn't specifically -- they all had some of each of those racks.

Q. And the garments that you purchased particularly, do you know what kind of racks they were on?

A. Specifically, I couldn't tell you which store had which racks at this time. I've been in too many stores since then.

Q. All right. When you walked up, were the garments that you purchased intermingled with other garments?

A. In some cases, yes.

Q. So, you had to sort through the garments to find [54] the one that you wanted that you thought would fulfill your mission?

A. If you want to call it sorting through; yes.

Q. You had to look at some garments that you didn't buy and then you found the one that you wanted to buy; correct?

A. Correct.

Q. On each of the displays, wasn't there a price point advertising what was found on the rack?

A. Not always.

Q. In some cases, wasn't there a sign that said $6.84?

A. I believe I may have seen that sign.

Q. Did you see any signs that said seersucker, children's garments with appliques?

A. No, I did not see that sign.

Q. Did you see any sign that said Samara look-alikes?

A. No, I did not see that sign.

Q. And did any salespeople say to you, here's where you buy the Samara look-alikes?

A. No.

Q. With respect to the phone call you had from Penney's, Penney's was upset because they claimed the price was lower; correct?

[55] A. They felt -- they were upset because the price that they were paying for the garments they could not retail to match Wal-Mart's retail for the same garment.

Q. So, the gist of their complaint to you was they didn't like the price competition; correct?

A. Well, they thought it was the same garment and they thought we were making it for Wal-Mart.

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[57] Gaffney - direct

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Q. Let me direct your attention to the customers to whom Samara sells. Could you identify some of those customers?

A. Samara's distribution is to the major department stores, specialty stores and the national chains. Dillard's, Belk, Mercantile, Federated, Sears and Penney's are our major accounts.

Q. Can you name some of the department stores that are owned by Federated?

A. Maces, Bloomingdale's, Rich's, The Bond and Stern's.

Q. And could you tell us where Dillard's is located?

A. Dillard's headquarters is in Little Rock, Arkansas and they have approximately 235 stores located in the southeast and southwestern part of the country.

Q. And could you tell us something about Belk?

[58] A. Belk is approximately 250-store chain headquartered in Charlotte, North Carolina, selling pretty much in the Carolinas.

Q. And did you mention Mercantile?

A. I did mention them as one of our major accounts.

Q. And where are they located?

A. Their headquarters is in Cincinnati, Ohio and they have stores pretty much scattered throughout the Midwest.

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[59]

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Q. Could you tell us to what extent Samara advertises its products?

A. Samara does some advertising in trade publications, but for the most part, our advertising commitment is with our customers in the form of cooperative advertising.

Q. Could you describe to the jury what cooperative advertising is?

A. Co-op advertising a method whereby the retailer will do their own advertising in -- usually in pamphlets and circulars and they ask their vendors to contribute towards the cost of doing that advertising.

Q. Are you aware of any stores that advertise your product without your cooperatively participating in it?

A. Yes.

Q. Now, let me direct your attention to early June 1996. Do you recall having a particular conversation with Deborah Jones.

A. Yes, I do.

Q. And after you had that conversation with Ms. Jones, could you describe what you did?

A. Well, my first reaction was to have Ms. Jones call Jim Tyler who is our independent sales rep located in [60] Charlotte, North Carolina. Jim has several Wal-Mart stores in his vicinity and I asked Debbie to call Jim and ask him to go into those Wal-Mart stores in his vicinity and see if he could find garments selling in Wal-Mart that looked like Samara garments.

Q. Within some period after you had that conversation with Ms. Jones, did you receive any packages?

A. Yes, the following morning, we received a package from Jim Tyler.

Q. And could you tell the jury what the contents were of that package?

A. Approximately a dozen garments, appliques, seersuckered garments that looked identical to Samara.

Q. And could you tell from the garments where they had been purchased?

A. Yes. We could tell they were purchased in Wal-Mart because of the price tickets and we were able to determine the Small Steps label was an in-house brand that Wal-Mart uses and we determined that from the Cuties by Judy's label that at least the Cuties by Judy's were manufactured by Judy-Philippine.

Q. After you received that package from Mr. Tyler, did you give instructions to any other Samara employees with respect to making garment purchases?

A. Yes, I did.

[61] Q. Could you tell us what those instructions were?

A. My first reaction was to meet with some of senior management team that happened to be in our New York showroom at the time. We were having planning meetings. And I spoke to Gary Goldman, our vice president and national sales manager, and asked him to assist me in calling our independent sales reps across the country to have them go into Wal-Mart stores in their vicinity and see if they could find appliqued seersuckered garments similar to Samara's line selling in Wal-Mart.

And then I also instructed several Samara employees to visit Wal-Mart stores in their home territory to see if they could locate Samara-looking-type garments in the Wal-mart stores.

Q. Did you do any shopping yourself?

A. Yes, I visited four Wal-Mart stores on my own.

Q. And what did you find?

A. I found appliqued seersuckered garments selling in Wal-Mart that were Samara look-alikes.

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[64]

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Q. Plaintiff's 38 is the Macy circular.

Can you look at that and tell us if you see any Samara garments there?

A. Yes, I see a Samara sundress.

Q. Could I direct your attention to Exhibit 39?

A. It's a store ad. I can't determine which store, but it's an ad showing our scalloped sundress set.

Q. And could I turn your attention to Exhibit 40?

A. It's either store advertisement advertising a Samara boys' short-all and a girl's sundress set.

Q. You described something earlier that you referred to as cooperative advertising. Are these examples of that?

A. They would be, but I can't tell if this -- if we had contributed to this ad. I have no way of telling. I can't even identify the store.

[65] Q. That's referring to 39?

A. This is 40, 39. Also, I can't identify the store. And we probably contributed to this Macy's ad.

Q. Approximately how much did Samara spend in 1996 on advertising?

A. Approximately $100,000.

Q. And could you describe how much the spending in 1997 --

A. Approximately the same.

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[66] Gaffney - cross

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MR. COSTON: All right.

Q. Turning first to your distribution, does Samara sell to discount retail stores?

A. No.

Q. Why not?

A. We've been a department store -- our marketing has been to department stores and that's our strategy.

Q. And has that been the case since the introduction of the seersucker appliqued line?

A. Yes.

[67] Q. Why would your sales to discount department stores be injurious to your distribution philosophy?

A. Well, the first point would be that most of the department stores retail our product at a higher price point than the discount stores would be willing to sell it at and we just can't make goods cheap enough to penetrate the discount store market.

Q. So, the traditional customers wouldn't buy your product if you sold to discount stores. Is that correct?

A. Yes.

Q. Have you ever sold to discount stores?

A. We have probably sold some off-price goods at the end of a season, but as a first mainstream customer base, no.

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[86]

Q. Mr. Gaffney, let me switch subjects now to the copyright registration application.

When did Samara decide to file notices with the copyright office?

A. Shortly after finding out that Judy had manufactured garments looking similar to Samara's.

Q. And prior to finding out that Judy had done this manufacturing, did you have any copyright registrations on file?

A. No.

Q. In your garments themselves did you place a notice that they were copyrighted?

A. No.

Q. As we sit here today are there any notices in Judy garments that they are copyrighted?

A. I don't know about Judy garments.

Q. I am sorry, forgive me. As we are here today does Samara have any notice in its garments that they are copyrighted?

A. No.

Q. Any notice on the hang-tag?

A. No.

[87] Q. Any notice in the label on the back?

A. No.

* * * *

[99] Q. To your knowledge, does anybody have a copyright claim on that particular fabric?

A. No.

Q. How do you know that?

A. Probably because it's freely bought and sold in the industry.

Q. So anybody can use that fabric?

A. Yes.

Q. Including Wal-Mart?

A. Yes.

Q. In fact, the same is true of every one of the fabrics on this rack, correct?

A. Yes.

Q. Wal-Mart can use the fabric that is in Exhibit 2, the seersucker check?

A. Yes.

Q. Wal-mart can use the pink in Exhibit 3?

A. Yes.

Q. It can use the blue-white multi-check in Exhibit 4?

A. Yes.

Q. Any of them?

A. Yes.

Q. And you don't have any problem with Wal-Mart using seersucker?

[100]A. No.

Q. So to the extent you may have made claims in this case for infringement based upon use of particular seersucker pattern you are not making that case now, are you?

A. No.

MR. REITER: Objection.

THE COURT: Sustained.

Q. To the best of your knowledge, Mr. Gaffney, does anybody in the world have copyright protection for any of the fabrics shown in these exhibits in front of the jury?

A. No.

Q. Why is that?

A. Because it's freely bought and sold. It's woven piece goods. No one has a design on the yarns.

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[103]

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Q. What role, if any, do you have in the design of Samara products?

A. Mostly at the final stage when we are putting the line together.

Q. I believe you said you do private label for Carters, is that correct?

A. We make Carters' outerwear using Carters' label. It's not for Carters. It's sold throughout the marketplace.

Q. I misunderstood. Do you make these products that are at issue in this case for any person for them to sell under their private label?

A. Yes, we have in the past.

[104]Q. And for which companies?

A. We have made them for Belk, Carters, Atkins.

Q. When Belk sold it under what brand name did they sell it?

A. Nursery Rhyme and Carousel.

Q. When Carter sold it under what name?

A. The Carter label.

Q. And the third company?

A. Atkins.

Q. What label did they sell it under?

A. I don't remember the names of their labels. It wasn't Atkins. It was some cutesy kid's name.

Q. Was all that merchandise manufactured in the Philippines?

A. Yes.

Q. Was it directly shipped then to Belk, Carter and Atkins?

A. Not directly shipped.

Q. It would come to your facility?

A. Yes, our distribution facility, and then shipped to the stores.

Q. On those particular garments, did they say anywhere that they were Samara garments -- that is, the Belk, Carter and Atkins private label?

A. No.

[105]Q. Those three customers elected to have their own name put in the garment, not the Samara name, correct?

A. Correct. The garments do have our end number which is a number that is registered with the government and traces back to the manufacturer.

Q. But that is not something that the customer would know.

A. The consumer would not know that, no.

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[108]
January 7, 1997
9:55 a.m.

* * * *

[127] Q. As we sit here today, Mr. Gaffney, to your knowledge, is Judy-Philippine authorized to manufacture children's garments free of any claim of infringement by Samara?

MR. REITER: Objection.

Q. Is there any product they can make?

MR. REITER: I'll withdraw the objection.

A. To the best of my knowledge, yes.

Q. Can they make children's garments that have seersucker?

A. Sure.

Q. Can they make children's garments that have a yoke collar?

A. Yes.

Q. Can they make children's garments that have appliques?

A. Yes.

Q. And can they make children's garments that have that whole thing, seersucker, yoke and appliques on the yoke?

A. Yes.

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[130]

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Q. For what purpose did Samara commence this action?

A. We commenced this action because our core business was being attacked. Our garments were being knocked off and the exact look-alikes were selling in Wal-Mart and we did not authorize that activity.

Q. You used the phrase just now, "core business," could you expand upon that?

A. The appliqued seersucker product is what Samara is known for in the children's wear industry. This is our core business. It is the lifeblood of the company.

Q. Had you formed a conclusion at the time that you contemplated commencing this action about the impact upon Samara of this kind of copying if it continued?

[131] MR. COSTON: Objection; leading, your Honor.

THE COURT: Overruled.

A. When the problem first was brought to my attention, the one objective that we had was that -- I had was survival of the company.

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Q. Are any of the people -- withdrawn

Were any of the defendants customers of Samara's?

A. Yes.

Q. Which?

A. Goody's.

Q. Did any of those retailers whom you named in this action, that is Goody's, K Mart, Hill's and Caldor use the clothing that had been manufactured by Judy-Philippine under their own label?

A. Can you repeat the question?

Q. I'll rephrase it.

[132] Among Goody's, K Mart, Hill's and Caldor, when they carried the Judy's merchandise, did they carry it under their own private brand or under some other name?

A. It was under the Cuties by Judy label, to the best of my knowledge.

Q. Of all the defendants in this action, did any of those defendants carry the Judy-Philippine's merchandise under a private brand name?

A. Not that I know of.

Q. Under what name did Wal-Mart carry it?

A. Small Steps.

Q. And what is Small Steps?

A. To the best of my knowledge, Small Steps is Wal-Mart's private level, in-house brand.

Q. Other than Wal-Mart, did any other chain carry Judy's merchandise under its private label?

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[144] Gosda - direct

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Q. Could you explain to the jury what your practice is in creating a design?

A. When in the beginning of creating a design, what we do is we start -- we have two seasons. We design spring-summer and fall-winter. We start with -- we're going to design a line for that season.

My supervisor gives me a plan and on that plan, he denotes fabrication and body styles. For apparel, about 90 percent of the body styles are already created and we're going to repeat them. There's a few left open that will be new designs.

So, I have all the body styles and all the fabrics picked out and I give to those body styles and fabrics an applique. So, I sit down and design the [145] applique.

Before designing, of course, I need inspiration. So, I shop stores. I shop all kinds of stores. I shop clothing stores, home stores. I shop bookstores. I shop card stores. I look at magazines. I look at real life. So, with that inspiration, I then go and I design my appliques, or if there needs to be body styles, also the body styles.

I do what I call rough sketches. They're usually in pencil. They're not perfect. That gives you an idea of what my ideas are. I show them again to my supervisor. He decides if he likes them, what he wants to keep in the line. Maybe he wants to throw some stuff away.

I rework, I do a little more work. I show them to him again and I may do that one, two, three times until he's happy with everything I've done. And when he is happy, I clean the sketches up. I work on them until I'm happy with them and they're perfect.

I put them in black and white. I use ink. And they become a black-and-white drawing. And with those black-and-white drawings, I scan them. We're now all computerized. Everything in our job we do on computer.

We scan those black-and-white drawings into the computer and those black-and-white drawings go into a form called BOMs, bits of material, and in those forms have all [146] the details.

It has the picture. It has the fabrication. It denotes where the fabrication goes. It has all the accessories. It has the packing instructions, label instructions, the style number. That's what our garments are identified, by style numbers.

It has the style number, and it also has any artwork attached. That also is scanned in and attached the colors are denoted for that artwork. And all of that is sent to Manila. It's sent via e-mail now and it's sent to Manila and Manila sends us back a sample in about four to six weeks.

Q. What happens when you get that sample back?

A. We look at the sample. If we're happy with it, it becomes part of the line. If we're not happy with it, we send it back.

We may not be happy with the placement of the applique, the size of applique. Maybe the construction of the garment. They might have done a poor job. We make comments. We send it back. We send the comments and it depends on the time frame. It also depends on what was wrong.

If it's not a big issue, we may ask for another sample. We may not, but those comments may then be put into production and the production should come out correctly.

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[147]

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Q. I'm going to show you Exhibit 10A.

MR. REITER: Could I have Mrs. Gosda come down and stand before the jury?

THE COURT: Yes, yes. If you could hold it so that the jury could see 10A.

Q. Are you familiar with that design?

A. Yes.

Q. Could you tell us the basis of your familiarity?

A. I was in charge of designing the applique.

Q. Is that the applique the you designed?

A. Yes, it is.

Q. Could you describe to the jury the process by which you designed that applique and the kind of choices you made in doing so?

A. Once again, like I said, I got a plan, so I --

THE COURT: Ms. Gosda, you need to speak up so the reporter could hear you, but we're switching now.

A. So, I knew the body and I knew that, you know, the applique in this body -- this is the sample where Samara would put the applique.

And we wanted to fill the whole area. So, we put [148] three items across. This is a baby garment, either newborn or infant. We probably product it in both size ranges.

So, when I do newborn and infant items, I make it what I called rounded. I want them to be soft, cute, that kind

of thing. So, I made it rounded. And being three cars, I made it simple. There's no bumpers, headlights. There's nothing like that on the car.

You don't want anything making your eye go a little crazy. So, I made it rounded and I split the window, just to make it a little interesting. If there's one big glob of yellow, yellow is an strong color and is going to hit you right in the face.

And the wheels, you notice there's a center color. So, in the center color, it's a yellow, too, balancing that yellow. Yellow is a very strong color.

And that's pretty much where my conscious decisions came up doing that applique.

[149] Q. Let me show you another garment as well.

May I show you Exhibit 10B, which is a garment with a Wal-mart price tag and a Small Steps label.

Can you hold the two garments side by side so the jury can see them.

I am handing the witness now Exhibits 3A and 3B.

Ms. Gosda, are you familiar with Exhibit 3A?

A. Yes.

Q. And could you tell us what that is?

A. This is a Samara sun dress, again an infant sun dress with a strawberry basket applique on it with strawberries.

Q. What is the basis of your familiarity with that particular design?

A. I designed this applique also.

Q. Could you tell us, as you did with respect to the other garment we had you look at, how you came up with these designs, what sorts of choices you made?

A. Once again it would be the similar situation where I am given a plan and the fabric and the body were picked out. In this body Samara always puts -- we put subject matter in the yoke and to make it balanced you want the same subject matter on the skirt. And the picking of the subject matter is arbitrary. It's cute. We are going to use strawberries. So I drew the strawberries and put [150] them in a bucket. Again it's cute. I wanted to do it. The bucket being designed is one color. It's simple. It's not too hard on the eye. But you want a little interest so I put the lines going across just to create a little texture and make it look a little more interesting. Again the strawberries cascading out of the bucket like they would in nature, and I put a strawberry on the bottom because I want the balance. I don't like things unbalanced. That is the way I do things.

I like it when it looks nice and balanced, symmetrical, and the three strawberries on top. I didn't like when strawberries look too much like a heart so I wanted to make this a little flat. I didn't do it like a heart and a leaf going this into the strawberry bringing the leaf onto the strawberry.

Q. You have another garment that I asked you to hold there, which is Exhibit 10B. Could you hold that up.

THE COURT: 3B.

MR. REITER: Yes, 3B. Thank you.

Q. When you design clothing do you design it with a particular look in mind?

A. I definitely do.

Q. And if you can go over to the rack, could you looking at other Samara garments, explain what that look is and how you attempt to achieve it?

[151] A. I call the Samara look simple-like elegance, or simple sophistication. When I first started working at Samara it took me a while to get it because I came from different companies that did things much more racy. There were more elements in the items. But when you look at a Samara garment they are simple. They are not too simple where you are bored with them but they are simple. They look sophisticated. They look boutiquey. They look very, very nice.

Like I said, it took me a while. It's hard to put into words, but there is a look. There is something I had to learn. I remember my boss, my supervisor, said it doesn't look like Samara, you can't do it that way. It took a while. This is what we do. It just looks like I said, simple sophistication.

Q. Turning to Exhibit 4A and 6A, could you explain how that -- if it is, is that prat of the Samara look?

A. Yes, it is. It's nice and clean. There is the strawberries. They look right. I don't think -- I know you want to keep things close to nature so we didn't make the strawberries purple. We made them pink, not red. It's a pink. It's a pink one tone off the seersucker so they are not too bright and saying "look at me, I am strawberries." And the green and it balances. It's a nice light green balancing with the pink.

[152] Q. Is there a connection between the applique itself and the collar in which it sits?

A. Yes, there is. This is called a scalloped collar and what we do is design designs to fit into a scallop.

Q. As far as you know, is that the only way in which this kind of design can be done or -- I will rephrase that.

Are there other ways to put appliques on children's clothing besides the kind we see here?

A. Yes, many. There are many ways.

Q. I am showing the witness what is marked as Exhibit 18, a Carters' garment.

I am going to hand you a series of garments, Ms. Gosda, and could you tell the jury whether they have, in your view, a Samara look or are they different, and if they are different explain how they are different.

A. This is different. First, we don't do accessories with our garments. Secondly, fabric mixing. We don't often do fabric mixing. It's not just what Samara does. Also, the knit with the woven.

Q. What about the applique?

A. The applique is just -- well, honestly I probably wouldn't put yellow on that. That is a lot of yellow.

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[153]

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Q. Ms. Gosda, I had you last looking at Exhibit 18 and you were describing that garment compared to Samara's garments. Could you just put it over near the Samara garments?

A. Sure. It looks so unlike ours there is really no comparative garment.

THE COURT: I couldn't hear you.

A. It's so unlike ours there is no comparative garment.

Q. Perhaps it would be good if you stood there because it may enhance the likelihood people will hear you and me.

Let's look at Exhibit 19, which is a Small Steps Wal-Mart garment, and with respect to these without my repeating the question what I ask you to address is the similarity or dissimilarity between Samara's look and the look of this garment.

A. Again, this is a collar with decoration on it but you can see it's very different from our collars with decoration on it. Sometime it's very hard to put into [154] words what sometimes visually is easier.

Q. On that particular garment --

A. The collar is much smaller. It's not as important as in our garments. We make the collar important because that is where the decoration is. It's embroidery not applique.

Q. To what extent is that design in Exhibit 19 integrated with the collar as compared to the Samara garment?

A. I don't understand what you are saying.

Q. What is the relationship --

MR. COSTON: Objection, leading.

THE COURT: Sustained.

Q. What is the relationship between the embroidery on Exhibit 19 as compared to the applique on Exhibit 8A?

A. 8A, as you can see the applique is in the collar shape. It makes the shape of the collar. On this it's just applied into the collar.

Q. I am now showing you Exhibit 20.

A. There are two pieces and this is, again, just another way to decorate clothing but it's very, very different. The leaves are appliqued and the flowers are embroidered. There is the little outline embroidery, very different than what we do. It has much more color going on than what we do. The body is something that we don't do. [155] We don't do two-piece bodies such as this.

THE COURT: What brand is that, 20?

THE WITNESS: There is no label in the neck.

THE COURT: Alright.

Q. Exhibit 24 is --

THE COURT: I take it 20 is not a Samara?

THE WITNESS: No, it's not a Samara garment.

MR. COSTON: Can we ask we designate them as Defense 20 or Plaintiff 20, because there are a lot of garments here.

THE COURT: We should be using plaintiff and defendant. And we have been referring to all plaintiff exhibits for the record, correct?

MR. REITER: These are all plaintiffs. I will be returning to defense exhibits and I will make that clear on the record when I do.

Q. This is Plaintiff Exhibit 24 which carries a Mine Alone label and hang-tag.

A. Again, it's another way to decorate. It's just different. It's much smaller than what we do. The mix of fabrications isn't common in Samara. The black outlines -- we don't use black outlines. In our look we think it's too harsh for

children, and both the pot on the hearts and the flowers are black outlined. Actually it's all black outlined.

[156] Q. Discussing the appliques and their appearance on the fabric rather than body style in the fabric itself, let me turn your attention now to Exhibit 25 which has a Mervyn's tag on it.

A. In regards to the applique, it's very different than something we would do. This is screen printed and then the heart is appliqued on. Our appliques are solid pieces of fabric or something a printed piece of fabric as you see in the mini dots appliqued on. There is also a three-dimensional rosebud. You wouldn't see that. And there is also words. Words kind of are not Samara. We just don't do words.

Q. Just so there is no confusion, Ms. Gosda, you are standing next to Exhibit 8A and next to Exhibit 8A is Exhibit 8B. Who is the manufacturer of Exhibit 8A?

A. Samara.

Q. And if you can just move aside that other exhibit, can you tell us what the label is on Exhibit 8B?

A. Cutesies by Judy.

Q. Is there a tag on there that shows where it was purchased?

A. Wal-Mart.

Q. Can I ask you just one more thing. Could you just hold those two garments up before the jury so they can look at them closely, so they can determine if there are any [157] similarities.

Thank you.

I am now showing the witness Exhibit 26, which simply says Sample Line and Fashions Products Limited.

A. Again in reference to the applique?

Q. The applique and it's relationship to the fabric.

A. The applique in relation to the fabric we could wouldn't put white on the stripe because it shows through. It also shows through on the yellow. According to my designing for Samara it's a bad choice.

Q. Does the applique itself look like a Samara applique in other respects?

A. I think the coloring is bad on this one.

Q. What about the size of the applique?

A. Actually I think the placement is a little low because you are going to be ending up in the belly and when a child sits you won't see that whole applique. You want it a little higher.

Q. How about the busyness of that design compared to a Samara design?

A. Again, for Samara sails would be the same color. There is too much difference there.

Q. Directing your attention to Plaintiff Exhibit 27, which is a Wal-Mart garment that was manufactured by Judy.

A. The placement of the applique is a little [158] different and the design is a little weird. The sails are going into the boat. And the stripe gets a little confusing with the garment stripe. You have another stripe going on and this sail is a whole different color with different color outlines. This is a little busy.

Q. Does Samara make appliques and put them on fabric in that way?

A. Just to denote my history with Samara, recently I have just been designing the boys outerwear. I was designing all the para, all the outerwear up until I would say 1994, and if there is new styles I don't want to say no because I don't know if there are any new styles that we have.

Q. Historically.

A. Historically, no. None that I was involved in when I was designing.

Q. Turning now to Plaintiff Exhibit 28, which has a Hex label on it.

A. Again this is two pieces so you can see. And this applique is pretty busy. It has the dots on the gingham. There is a lot of white there going on right in that sail. There is so much white. And there are also three of them. In this two-piece garment that is a lot of appliques.

Q. Can you hold that sail next to the Samara sail on [159] Exhibit 8A. In all the garments I have shown you in this grouping, and I have one more, do any of them have what you believe to be a Samara look?

A. No, they don't.

Q. Turning to Exhibit 29, which has strawberries, in addition to addressing that garment itself, can you compare it to Plaintiff Exhibit 4C.

A. Well, they are both strawberries but after that it kind of ends. These are strawberries with flowers. The leaves are very different. Samara's strawberries have vines and again there are three of them. That is the garment. And they are also shaped very differently and the leaves are shaped very differently.

Q. Let me show you at this time, Ms. Gosda, defendant exhibits, Wal-Mart Trial Exhibit 62. It says Little By Little on the back. I am asking you the same series and I would like you to address the same series of questions.

A. This is very different than anything we would do. Here on the neckline you will notice this is manufactured lace and they have taken the manufactured lace and put it into the flowers, all three flowers, something we wouldn't do, the ric rac and the 3-D. That is a lot going on and we wouldn't do an applique like that.

Q. Showing you now Wal-Mart Trial Exhibit 63.

[160] A. This is a very complicated embroidery, besides the fact this is something you couldn't do, a Minimouse, unless you are licensed to do it. And it's also very complicated. There is a lot of black. We stay away from black.

Q. There are also some strawberries on it.

A. There are strawberries and they are tiny and done very differently and they are embroidered and there is a black outline on the one she is holding. All those type of elements denote it's different than Samara.

Q. Turning your attention now to Wal-Mart Trial Exhibit 64, which is a Baby Togs garment from Wal-Mart.

A. Again, this becomes an element because it goes along with and it reacts with the embroidery, and the embroidery is just very different.

MR. COSTON: Your Honor, I can't see.

Can I ask the witness when she says "it" to describe the "it."

THE COURT: You can also step to the side if you want.

A. The bow interacts with the embroidery. That is what I was trying to say. So it becomes an element. We don't put 3-D elements with our embroideries or appliques.

Q. I am now showing you Wal-Mart Trial Exhibit number 61, which has a Little By Little hang-tag on it.

[161] A. It's a 3-D butterfly. It has two pieces and it's actually not even embroidered or appliqued. It's heat transferred. It's very different.

Q. I am now showing the witness Wal-Mart Trial Exhibit number 59, which has a hang-tag from Gelmart and is from a Wal-Mart store.

A. This just doesn't look right. Again, it's hard to put into words. This actually looks unfinished to me. Again, the 3-D makes it different than Samara. The dot is very big. We often don't use dots this big. If you are using a small applique piece you will never see the dot so it doesn't make it worth it. The stems look like they need something. It's very long for this garment. The baby is going to sit and you won't see much of that. Most of these babies are sitting at this point.

Q. I am now handing the witness Wal-Mart Trial Exhibit number 57, which is a Baby Togs garment.

A. The yoke is very low. The colors -- we don't run these colors. And this is something we don't do, the embellishment of the stripes, the dashes. We don't do that.

Q. What about the appliques themselves?

A. You won't find appliques shaped like this or like this in our line. Just the subject matter. We don't often do circus animals. Again, the yoke is very low.

Q. Showing the witness Wal-Mart Trial Exhibit 56, [162] which is a Baby Togs.

A. Again, I think this is very busy for the look that we do. You have a striped background and the stripes on the sails is kind of confusing to the eyes. There is a lot of stripes going on there. And there is no consistency. This is fabric, this is fabric, and these are embroidered. If we were going to do something it would be consistent, all embroidered.

Q. Showing the witness Wal-Mart Trial Exhibit number 55, which is another Baby Togs.

A. This is two pieces also and again in relation to the busyness, I think this is just busy. All of this embroidery outline on the fins makes it a little confusing and a little busy and the outline with the circles.

Q. I am not handing the witness Wal-Mart Trial Exhibit number 54, which is a manufacturer called Wee Too.

A. I know saying simple is good, but this is too simple. It's very stark. All that navy on that little pocket. Also in relation to a lot of the garments, not everything is necessarily going to be placed the same area. Like the shortall that you just showed me, the Baby Togs that you might want to hand me back, it's quite possible the applique can go there. There is no reason it has to be on the chest, and we do that often. Samara does it often, that there is an applique in the leg.

[163] As I said with this one, this is a little too simple. Again, it doesn't have to go in the pocket. This could be nicely balanced if you put the embroidery over here because you have a pocket and a little embroidery.

Q. I am showing the witness Wal-Mart Trial Exhibit number 53, which is a two-piece garment and I can't find a label on it.

A. Again, this is what I would consider kind of badly done. The ladybug doesn't look very much like a ladybug and

this is all knit applique. We don't use knits in our appliques. We use all woven fabrics.

Q. I am handing the witness now Wal-Mart Trial Exhibit number 50.

A. These aren't even appliques. These are done by a lace company and then tacked on.

Q. I am now handing the witness Wal-Mart Trial Exhibit number 65.

A. The whole garment in total doesn't like look like a Samara garment. You have embroidery on a shifley. Shifley is when you buy a piece of lace already embroidered. A lot of collars will be done in shifley and this has holes which will denote it's a shifley collar. They probably would have bought this like this, the whole thing, and done these to match, I suppose.

Q. I show you Wal-Mart Trial Exhibit number 73, [164] which has a Wee Too label and hang-tag.

A. As concerns to this, this applique again is too busy, having the plaid behind the ball, but also these don't look very right. I don't know if they are supposed to be bats or an X or golf clubs. As far as my sense of design I wouldn't want that to look like that.

Q. I am now handing the witness Wal-Mart Trial Exhibit number 69, a Mick Baby garment.

A. Again, what I have said about a few of the appliques, this happens to be embroidery on felt but it also happens to be very busy. There is a lot of black going on in there and what I can see as a designer I know what they have done, they want the colors to match the fabric. We wouldn't do a fabric like this with these colors.

Q. Handing the witness now Wal-Mart trial Exhibit 68, another Mick Baby.

A. I think this is pretty much the same. It's the same thing. Also, if you note there are two border colors. When I do a patch for Samara I wouldn't do two border colors; I would do one.

THE COURT: Are there many more of these? I think we are getting the point here.

MR. REITER: Four. I will skip the next two Mick Babies and show the witness two more, which I will show at once, Exhibit 72, a Wee Too, and Wal-Mart Trial Exhibit 71, [165] also made by Wee Too.

A. Again, not commenting or negatively trying but, again, it's busy with the flag and the art work just doesn't look right. It looks a little askew. This wing here looks askew. The scarf is a little long and the words -- we just don't do words. This is just not a Samara look. It's sometimes hard to define. When you see it it's kind of easy but in words it can be difficult.

Q. Have any of the garments I have shown you had, in your view, a Samara look?

A. No.

MR. REITER: I have no further questions of this witness.

THE COURT: Alright.

CROSS-EXAMINATION BY MR. COSTON:

Q. I am Bill Coston representing Wal-Mart.

I won't cross examine you on every one of those garments but there are a few more I would like you to look at.

A. Okay.

Q. Before we start, I think it's fair to say that there are a lot of children's garments in the world.

A. I think that is fair.

Q. There are almost an infinite number of ways to [166] design garments, correct?

A. True.

Q. A lot of different appliques, correct?

A. Yes.

Q. A lot of different kinds of fabric?

A. Yes.

Q. A lot of different treatments.

A. Yes.

Q. It's possible that a buyer of children's garments in the ordinary course of business could see tens of thousands of different garments in a year.

A. That is true.

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[168]

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Q. Now, Ms. Gosda, would you agree that the single ugliest garment of those that you looked at was the brown one?

A. Actually I would not.

Q. You thought one was uglier?

A. Uglier?

Q. Yes.

A. I don't think any of them are ugly. I think they are all different. I think they are all cute but very different from Samara designs

Q. If you can turn the rack around so we can get Exhibit 1, which has the ric rac with the flower on it.

Now, pointing to just the flower itself, the pink flower, that is a very common design in the design of children's clothing, isn't it?

A. Meaning that it's a flower or the way it's designed?

Q. That particular shape of a circle with five petals coming around appears quite often in children's clothing?

[169] A. Often, I don't know. It's a little vague.

Q. You have seen it several times?

A. I have seen it in many places I would say. I have seen it in real life. The thing is you are asking me to recall off the top of my head. I can't say for sure where I have seen this.

Q. You see a lot of stimuli in your life and you can't always remember where you see them.

A. Exactly.

Q. And that is true of people who buy clothing too, isn't it?

A. I think that is true of everybody, yes.

Q. Let me show you what has been marked as Wal-Mart 52 and ask if you could show that to the jury and describe the flower that is there.

A. It has a center and it has 1, 2, 3, 4, 5 humps that are not connected to the center.

Q. Now, comparing it to the Samara flower, is it similar?

A. Not the same.

Q. Is it similar?

A. In my opinion, no.

Q. It has five humps?

A. Yes.

Q. The Samara has five humps?

[170] A. The Samara has five petals.

Q. It has a center. The Samara has a center?

A. Yes.

Q. Let's direct your attention to Wal-Mart 51. Does this garment have the Samara look?

A. No.

Q. So it appears that Wal-Mart sells a lot of merchandise that doesn't have the Samara look, correct?

A. I don't know. I haven't gone through the Wal-Mart inventory.

Q. Of the garments you looked at here virtually none of them have the Samara look, correct?

A. Correct.

Q. So if Wal-Mart is selling these they are selling some merchandise that doesn't have the Samara look, correct?

A. "If," yes. Correct.

Q. Now, this garment does not have the Samara look, correct?

A. No, it doesn't.

Q. It has seersucker.

A. Yes it, does.

Q. But seersucker alone doesn't make the Samara look.

A. No.

Q. And it has not many colors, a limited number of [171] colors, correct?

A. Yes.

Q. But just a few colors doesn't make the Samara look.

A. No, it doesn't.

Q. Let's try Wal-Mart Trial Exhibit 58. Does that garment have the Samara look?

A. Yes, it does.

Q. And who manufactures it?

A. It does not say.

Q. Should a company be allowed to manufacture a garment like that, in your opinion?

A. It's not an exact copy.

Q. So having the Samara look is okay. You just can't do an exact copy, in your opinion?

MR. REITER: Objection.

THE COURT: Sustained.

Q. You don't have to answer that.

That has the Samara look but you would expect to find a garment like that for sale to the public, correct?

MR. REITER: Objection as to her expectation.

THE COURT: Sustained as to form. I am not sure about that.

Sustained as to form.

Q. You go shopping?

[172] A. Yes.

Q. You shop the competition and I think you actually said that earlier in your testimony?

A. Yes.

Q. In shopping the competition have you found garments similar to that?

A. Yes, I have.

Q. And have you gone back to your employer and said we need to stop a company from selling this garment because it's a Samara lookalike?

A. Because it's not exactly. It's not a copy.

Q. Wal-Mart Trial Exhibit number 70, if you could let the jury know whether you think that is a Samara lookalike.

A. No.

Q. Would you agree it's simple?

A. Simple.

Q. It has an applique?

A. Correct.

Q. On the yoke.

A. Correct.

Q. But is's not a Samara look and feel, if you will?

A. No.

Q. So that the jury can take from this that a company can sell garments with appliques, correct?

[173] A. Yes.

Q. And not have the Samara look and can have an applique on the yoke and not have a Samara look.

A. Correct.

Q. This will be the last one of the Wal-Mart exhibits, Trial Exhibit 60. Does this garment have the Samara look?

A. No.

Q. It does not?

A. No.

Q. It's seersucker?

A. That is correct.

Q. It has three appliques?

A. That is correct.

Q. In the yoke?

A. Yes.

Q. Scalloped yoke?

A. It's a scalloped collar.

Q. Scalloped collar. Am I misusing the word yoke?

A. Yes.

Q. What is a yoke?

A. It's this part of the body.

Q. I apologize.

A. That's alright.

Q. It has a scalloped collar?

[174] A. Correct.

Q. And it has the strawberries connected to the collar?

A. Correct.

Q. But that is not the Samara look?

A. No.

Q. Could you tell the jury why?

A. Because the strawberries appear to be under the collar. It looks unfinished. The collar also stops instead of going around because the body is very cut out. Our bodies are a little more full. We like to keep them a little covered, a little conservative.

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[178]

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Q. Ms. Gosda, do you sew?

A. Yes, I do.

Q. Are you familiar with pattern companies?

A. Yes, I am.

Q. McCalls?

A. Yes.

Q. New Look?

A. Yes.

Q. Simplicity?

A. Yes.

Q. Are you aware that those companies offer [179] to the public patterns for making children's clothing?

A. Yes, I am.

Q. Have you seen such patterns?

A. Yes.

Q. In your opinion, do any of those companies offer patterns to the public that invite the public to make Samara lookalike garments?

A. I have not looked at a pattern book in years so, to the best of my knowledge, I don't know.

Q. Well, I spent part of my Christmas vacation looking at them, so perhaps I can share Exhibits 86, 87 and 88 with you.

A. Okay.

Q. Have you seen them?

A. Have I seen these? I just looked at them right now.

Q. Prior to today do you recall seeing them?

A. No.

Q. But you have looked at pattern books in the past?

A. Yes, I have

[180] Q. And in the past, were you aware that patternmakers offer people the ability to make children's clothing?

A. Yes.

Q. And would you agree that some of the children's clothing depicted on there resembles Samara clothing?

A. Not closely, not -- I would say no.

Q. There is a romper with two cars on it; correct?

A. Yes.

Q. Does Samara make a romper?

A. We make a short-all. We call it a short-all.

Q. Do you make a short-all that has cars?

A. Yes, we do.

Q. There is an exhibit that shows a watermelon collar. I don't have it in front of me. Could you say the exhibit number for the jury, please?

A. I'm sorry; 88.

Q. 88. And what is the style of that dress that's shown there?

A. That would probably be considered a sundress.

Q. A sundress.

Does Samara make a sundress?

A. Yes, we do.

Q. Do you make a sundress with a watermelon collar?

A. Collar? This is a watermelon yoke.

[181] Q. Do you make an outfit that has a watermelon at the top of the garment?

A. Yes, we do.

Q. And is Simplicity offering the public an opportunity on how to make a sundress with a watermelon on the top?

A. Yes, they are.

THE COURT: Just, again, the difference between a color and a yoke?

THE WITNESS: Yoke is actually part of the body. The collar is a collar. The yoke -- if I could have one of the dresses to show you.

THE COURT: For those of us who don't have experience with patterns and sewing.

A. I'll show you on a dress. A yoke can be very long or it can be very short as this one is. It's the top part of the bodice and then something coming from that top, like shirring on a skirt or the vest of the boys like a short-all, where this is a collar. A collar is actually a collar.

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[186]

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Q. In fact, Mrs. Gosda, what becomes apparent in looking at all of these garments and the sewing materials and the appliques is that sailboats are a common theme in children's clothing; correct?

A. Yes.

Q. And cars are a common theme in children's clothing?

A. Yes.

Q. Strawberries are a common theme in children's clothing?

A. Yes.

Q. Hearts are a common theme in children's clothing?

A. Yes.

Q. Rickrack is used in children's clothing?

A. Yes.

Q. I just want to see what I've left out. This flower on Exhibit 1A is a common theme in children's clothing?

A. Yes.

Q. Tulips are a common theme in children's clothing?

A. Yes.

Q. Trucks are a common theme in children's clothing?

A. Yes.

Q. And it's a theme that is often carried out by the [187] use of appliques; correct?

A. It's a theme that's carried out in a lot of ways. There's a lot of ways to adorn children's clothing.

Q. Are you familiar with the Singer Sewing Company?

A. Yes, I am.

Q. Have you seen any of the materials they publish on sewing for children?

A. No, I haven't.

Q. Would you agree or disagree with the following statement: Appliques are a traditional method for decorating children's garments?

A. I would agree.

Q. Would you agree that people look for appliques, for ideas for appliques in magazines?

A. I would agree.

Q. And you yourself have looked in magazines for ideas on how to design?

A. That's correct.

Q. Would you agree that people look for appliques in looking at other person's ready-to-wear garments?

A. I would agree.

Q. And you yourself have done that?

A. That's correct.

Q. You've based some of your designs on what you've seen other people selling; correct?

[188] A. I base my designs on a lot of inspiration.

Q. Including what other people were selling?

A. That's true.

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[189]

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Q. Mrs. Gosda, have you ever done any quilting?

A. No, I haven't.

Q. Have you seen quilts?

A. Yes, I have.

Q. Are you familiar with a famous quilt design that's called the round rose with tulips?

A. No, I'm not.

MR. COSTON: May I approach the witness, your Honor?

THE COURT: Yes.

MR. COSTON: Wal-Mart Trial Exhibit No. 49 called "America's Quilts & Coverlets" and actually I'd ask that you take a moment to leaf through pages 160 through 180, if you would please.

[190] A. O.K.

Q. Mrs. Gosda, we have a little confusion about the numbering. Could you tell us what number is on the very front page of the book, the cover?

A. Oh, 99.

Q. 99?

A. 99?

Q. Have you looked through those pages?

A. Yes.

Q. Have you ever seen any of the designs similar to that before in your experience?

A. There's quite a few designs here. I think you're being a little vague.

Q. You're right.

Have you ever seen a design which shows this kind of five-petaled flower with tulips coming out of it?

A. Is there a design like that in this book? Is that what you're asking me?

Q. Yes.

A. Yes, there is.

Q. And prior to looking at that book, had you ever seen a design similar to that before in your life?

A. Yes, I have.

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[191]

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Q. Directing your attention to Wal-Mart Exhibit 48, pave 574 captioned newborn to 12 months, I'd ask you to look at that page, if you would.

[192] A. O.K.

MR. RIBACK: Which page?

MR. COSTON: 574.

Q. Have you seen the page?

A. I'm sure I have.

Q. Is there depicted on that page a child's garment with blue and white checkered seersucker?

A. Yes, there is.

Q. And does the garment have an applique on it?

A. Yes, it does.

Q. Is it a garment that was manufactured by Samara?

A. No, it wasn't.

Q. To your knowledge, did anyone from Samara ever say to Penney's, stop selling that garment?

A. Not to my knowledge.

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[193]

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Q. In fact, is there anyone in the world that knows more about Samara appliques and Samara garments than you?

A. I'm sure there is.

Q. And who would that be?

A. That would be my boss, Gary Goldman.

Q. And he will appear. We can ask him some questions.

Other than Mr. Goldman, do you think there's anybody else in the world who knows more about how Samara garments look than you?

A. Yes, I'm sure there is.

Q. Who is that?

A. The previous owners.

Q. Who are they?

A. Bill and Vac Samara.

Q. Other than the two Samaras and Mr. Goldman, are you aware of anybody else that knows as much about Samara designs as you?

A. I suppose there isn't.

Q. And you're able to see the Samara look as you defined it. It's hard to define, but I know it when I see it. You're able to do that because you've worked with these appliques every day; correct?

A. That's correct.

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[196]

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Now, if I could direct your attention to Exhibit 4A, could you tell us whether Exhibit 4A is a Samara garment?

A. Yes, it is.

Q. And do you believe that Exhibit 4A has the Samara look?

A. Yes, I do.

Q. And do you believe that -- I believe I testified on cross-examination that the garment you're holding does not?

A. No, it doesn't.

Q. As best you can, could you explain to the jury how you formed those conclusions?

A. O.K. Again, the whole strawberry is on the collar. The scallop is much more subtle. The strawberry is fitted to the scallop. Here you have a scallop and some strawberries hanging off it. Also, the leaves and the vine of the Samara strawberry are included in the collar.

[197] Here, you have no definitive leaves or vines. It's not real clear what these shapes are. Our education makes us assume what they are, but it's not real clear what they are.

* * * *

Q. Mr. Coston asked you whether you shop and go to stores and look at what other manufacturers are doing and look at catalogs. Do yo remember those questions?

A. Yes, I do.

Q. Have you seen other manufacturers who place their appliques on collars in the same way that Samara does on Exhibit 4A and on some of the other exhibits we have?

A. No, I haven't.

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[198]

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Q. When you sit down to design an applique, what is your goal?

A. To create a cute applique, to create something that looks right, especially for Samara, to create the right looking applique for the garment and for the company.

Q. As part of that, is it your intent to use an applique that other people are using or to use one that hasn't been used before?

A. To use one that hasn't been used before.

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[199] Gosda - recross

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Q. In depicting a strawberry, is your goal to give your interpretation of that strawberry?

A. Yes.

Q. You still want it to look like a strawberry?

A. True.

Q. But it's your interpretation?

A. Correct.

Q. Now, would that interpretation include having vines or not having vines? Is that part of the interpretation?

A. That's part of the interpretation.

Q. Is it an important part of the interpretation?

A. Yes, it is.

Q. And would the interpretation include having three leaves on top or five leaves on top?

A. It could be either or.

Q. And would that be an important part of your interpretation of the strawberry?

A. Yes, it would be.

Q. So that one strawberry that had five leaves would be different than a strawberry with three leaves?

A. That's correct.

Q. And a strawberry that had vines attached would be [200] different than a strawberry without vines attached?

A. That's true.

Q. So that these differences can make one garment different from another?

A. Yes, it can.

Q. Now, in fact, Samara Exhibit 4A shows five leaves on top all defined by stitching and vines; correct?

A. Correct.

Q. And the Judy-Philippine-manufactured garment doesn't define the leaves; does it?

A. No, it doesn't.

Q. And it doesn't have any vines attached to the strawberries?

A. No, it doesn't.

Q. So, this is Judy-Philippine's interpretation of three strawberries; correct?

A. That would be an assumption on my part; yes.

Q. Well, it's not the same as yours is it?

A. No, it's not.

Q. Now, down here on Exhibit 3A, this is Samara's interpretation of a strawberry with three leaves on top; correct?

A. O.K.

Q. Judy-Philippine's interpretation of the same strawberry has five leaves on top; correct?

[201] A. That is correct.

Q. So, it's a different interpretation of a common fruit; correct?

A. Correct.

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[202]

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Q. Wal-Mart Exhibit 10, for the record, is a garment purchased at Hecht's under the All Mine label.

Does Samara sell to Hecht's?

A. To the best of my knowledge, I don't know our whole customer list.

Q. To the best of your knowledge, do you manufacture a private label for Hecht's called All Mine?

A. Honestly, I don't know.

Q. To the best of your knowledge, did Samara manufacture this argument, 10?

A. I don't know. I don't think.

Q. You don't think so?

A. I don't know.

Q. But you're not certain?

A. I'm not certain.

Q. Has Samara ever manufactured garments with butterflies?

A. Yes.

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[208] Goldman - direct

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Q. Do you design any of the appliques yourself?

A. Occasionally.

Q. Is there anyone at Samara who has overall responsibility for creating the Samara look?

A. That would be my responsibility.

Q. And how do you do that?

A. It's something that we've developed over the years by -- can you repeat that, so I can understand it a little bit?

Q. The question is, how do you design clothing or how do we phrase it, how does Samara maintain its look and what role, if any, do you play in that?

MR. COSTON: Objection; compound.

THE COURT: Sustained.

Q. Do you play a role in Samara's maintaining its look?

A. Yes.

Q. Could you describe to the jury what that role is?

A. It's looking at every applique that goes onto every garment that the designers are doing to make sure it looks like the stuff on the rack up there, actually that it's -- it all hangs together.

We have kind of a feeling that everything that we [209] produce should kind of look like it comes out of our office. It shouldn't be all over the place. It should have a consistent feel to it.

Q. Why is that important to Samara?

A. To build a brand loyalty and establish a customer base.

Q. Are there designers who are employed by Samara?

A. Yes, we have three of them.

Q. And could you describe to the jury your relationship, your working relationship with those designers?

A. Well, at the beginning of the year, when I lay out the plans and we pick out all the silhouettes that we are going to be using for the season, they sit down and they would start putting appliques together that we would want to go on the garments and we pick out themes that we'd want to use, whether it be transportation or sports for boys or fruits or flowers or doll houses or whatever would be in the girls and we try to balance out the amount of appliques that are going into the whole line, then to make sure that they fit and color coordinate into each product category.

Q. Now, is your concern in your role limited to the appliques themselves?

A. The way the appliques coordinate into the bodies, whether they fit into a pocket or how they scallop into a [210] collar or how the colors work with the body designs that we're choosing.

Q. Now, in this case, Samara has introduced in evidence a number of copyright registrations and a number of garments that were copyrighted. To your knowledge, what do those registrations encompass?

A. The applique design where they're placed on some of the garments, whether they be scalloped intricately into

the collar, how they hang off it, the use of the shapes that we've picked to put on the appliques.

Q. Is it fair to say that it's not limited to the appliques themselves?

MR. COSTON: Objection; leading, your Honor.

THE COURT: Overruled.

You can answer that question.

A. It's not just the appliques, but how the collar is an applique itself. When it's scalloped, that whole collar is an applique.

Q. To your knowledge, does anyone else in the children's wear industry do that?

A. Not to the extent we do it.

Q. Up until June of 1996, did you ever see anyone do it to the extent that we've seen here?

A. No.

Q. Did Samara's clothing always look this way?

[211] A. No.

Q. Was there a point in time which it began to look this way?

A. Back in 1985, we made a strategic decision that we were going to change the look of our business and change the direction where we were heading and we went after a total different market.

We used to be more of a say a J.C. Penney discount store source and we decided that we'd rather move to the other side and do a little more department store business

and spread our risk and not be too dependent on such big chains. So, we've changed the total concept of what we made.

Q. Could you describe what that change encompassed?

A. Well, it starts out before that. Half of the stuff was probably designed over in the Philippines and we had no real input over here to what we were selling. It was just produced for us and we would ship it. We took total control of the look of the garments.

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[217]

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Q. Mr. Goldman, one part of Exhibit 3D and there's one part that I'd like to draw your attention to and that's the color photograph that's on the right side of that exhibit. To the right of the garment, can you see a hang tag?

A. Yes.

Q. And whose hang tag is that?

A. That's our company's hang tag.

MR. REITER: May I, your Honor, just show to the jury Exhibit 3A next to the photograph that's depicted on 3D?

(Exhibits 3A and 3D published on the jury)

Q. Could you proceed, Mr. Goldman?

I. With the next one?

Q. I think we're up to 3E.

A. O.K. It is a P.O. for a style from Wal-Mart to Judy-Philippine.

THE COURT: What's a P.O.?

THE WITNESS: Purchase order of what they're going to purchase from them.

Q. Could you tell us what Exhibit 3F is?

A. It is our artwork showing when we had first done this applique and how many times we've done it since then on [218] other garments. It's pretty much part of a BOM form.

Q. Could you describe to the jury what a BOM form is?

A. It's a bill of materials, everything that goes into the garment, from fabric to buttons to the applique design to the colors to the finished product.

MR. REITER: Your Honor, may I just circulate that one document among the members of the jury?

THE COURT: Yes.

A. This is the cover sheet of a BOM. These are just–

MR. REITER: Your Honor, might I suggest since it's -- I don't know, maybe more than a dozen pages that perhaps the jurors can look at it in groups of two to speed it along.

THE COURT: We should proceed. If you can sort of look along together, that would help.

Q. Now, in your experience in the industry, Mr. Goldman, do other manufacturers sell clothing that looks like the clothing that Samara sells that's at issue in this case?

A. No.

Q. And how do you decide when you look at a prospective design whether or not it looks like Samara?

A. It's a feeling we have putting the line together. [219] Hanging them all on the wall, a complete line, kind of if we put up 150 garments on the wall, we want them all to have the same feel. If this stuff were to go into a Gap or Gymboree, for instance, it just wouldn't fit. It's got a different look. It's really got to fit the concept that we've created.

Q. In the past, has Samara -- withdrawn.

Since 1985, has Samara from time to time departed from the Samara look?

A. Yes.

Q. And what's been its sales experience when its done so?

A. Not so good. It's been small experiments that don't seem to put us in any other direct -- but we always go back to what we do best.

Q. And does Samara experiment from time to time?

A. Yes, we do.

Q. With respect to the summer line in 1996, did any portion of that line depart from what you consider the Samara look?

A. About 5 to 10 percent.

Q. And what about for the 1997 line?

A. We didn't depart one bit whatsoever.

Q. Mr. Goldman, could I ask you just to step down from the witness stand.

[220] And without necessarily going into detail, could you just describe to the jury the documents that are marked as Exhibit 36A through Plaintiff's Exhibit 36R?

A. This would be our 1997 lines what we're shipping this year and I guess I should explain in each body style, the way we produce these come a minimum four appliques and four colors in a dozen, a style like this, which would be one of our better styles.

Q. You need to identify the specific --

A. 36A, B, and C. We would consider it as one SKU with other appliques within the same dozen that we would ship a customer.

Q. I'm sorry to interrupt you, but the jury may not know what SKU means.

A. Stock keeping unit. There are 12 pieces in a dozen and each one has its own special place in the dozen. We are to keep track of them. We would put four different appliques into this one dozen that we're shipping on four separate colors.

But a style like this, which is a good style for us, we might have three different groupings in that season, which would account for 12 different appliques. So, we are giving our customers a selection of different appliques every time we ship. These have been designed to fit into the scallop.

[221] As you could see, they're kind of all rounded type of feel edges on them. It's something that we wouldn't put something with rectangles or so into the scallop and change the feel of what we're trying to accomplish here.

The rickrack and collar and pockets, it's getting the right shapes and sizes to fit into the collar and not overwhelm the whole design and picking the colors that we feel look correct on each product category.

Q. Could you just tell for the record what garments you're holding up? They have a little yellow tag.

A. This is 36F, B and D. And, again, our ruffly shoulders sundress. These are 36G, H, I and J.

And, again, on something like this, how we would always put an applique on the skirt and pick up the applique in the yoke three times across and it's picking an applique, say something like this which has the three hearts and finding something that we could work to fit into the yoke.

And, again, putting the bows on top of the hearts, so we could pick up the bows and not just make it just three hearts on this garment. And, again, the coordinating the colors of the fabric with the appliques on the fabric together.

Just another style that we feel hangs nicely with our product and these are 36R or K and L make that. And on the pink, we would do a soft color and something like royal, [222] we go a little harder, as far as the feel. And 36M, it's a pinafore-type dress and, again, sticking with primary colors because we're on a primary ground here and picking up the applique.

And this one, you could see we repeated there this year doing it on two different garments, colored it up two totally different ways and really getting the same look, but different -- done differently on different colors.

Another garment here are three whales in a collar again and, again, very understated and eye-pleasing and soft colors used on one. One of the general themes here is we do a lot of selling of appliques. That is our business, selling appliques, but gentle colors, pocket treatments are what we're going after.

If you notice, most of the silhouettes, the bodies are the same and we're attaching different collars onto the dresses.

MR. COSTON: Your Honor, could I object and just ask the witness to proceed with question and answer. This is sort of a rambling monologue without any --

THE COURT: Overruled for this part of it.

A. Boys' short-alls, 360, P, Q, and R, and it's picking up an insert applique and repeating the applique across the yoke. And the same thing with doing sailboats in it and short-all sets where we do either setting the [223] applique in the center or setting it on the leg.

But, again how we try to make the appliques pop off the garment and a lot of time has been put into coloring up each applique and designing each applique and making sure where all these colors make up with the piece goods on it.

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[224]

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Q. Can you describe the exhibits to the jury, Exhibits 37A through whatever the last one is.

THE COURT: P.

A. These garments are shipping for spring `96 and as you can see, it seems that they all have the same consistent look that we have been using over the years, what we used for `97, what we used back since 1990, and so on. It's the same type of feel. We do repeat some of the appliques year after year to have a consistent feeling out there.

[225] 37H through K is the same body style again with different appliques that we fit into the collars and onto the pockets and it's the same consistent feel again of what we are trying to achieve here.

The last five garments here is the same thing. It's what we call the Samara look.

Q. Mr. Goldman, could you tell the jury whether Samara manufacturers any clothing with a label other than Samara?

A. Occasionally.

Q. In 1996 could you tell us to what extent it did so?

A. We do private label for Belks and Carters stores, and somewhere about 15 to 20 percent of our production.

Q. Of the Carters, were the Carters production composed of Samara appliques?

A. Parts of it were and parts were appliques given to me by Carters to put on our garments because they have their own look and their own theme that they would like to carry in their stores. So we have produced the garments to fit their needs more.

Q. Earlier Kathy Gosda was shown Wal-Mart Trial Exhibit number 95 and Trial Exhibit 95 was shown to her when she was discussing Plaintiff Exhibit 10A.

Looking at Trial Exhibit number 95, does it have [226] a Samara look to it?

A. No.

Q. In 1995-1996, approximately how many different appliques did Samara utilize in its clothing lines?

A. Throughout the year we would use somewhere between 4 and 500 appliques, different pieces of art work that we designed.

Q. In the course of the years '95 and '96, approximately how many of those are brand new appliques designed that year?

A. Somewhere about 25 percent. We repeat and put them back into a library and bring the appliques back over time to keep our look and our feel.

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[229]

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Q. Mr. Goldman, I am now handing you Plaintiff Exhibits 2A and 2B. I don't know that the jury has seen something similar to 2A so can you describe what that?

A. Sometimes instead of making a whole sample, because it's time consuming and more expensive, we will just take the applique and do it on a swatch of fabric to make sure we really like the way the colors work with the fabric or that the size is correct and we can just take it and lay it on top and see if it fits on the garment. So 2A here is a Samara swatch of a strawberry design we did for various different garments, and 2B is a sun dress with a Cutesies by Judy label, and it's sold at Wal-Mart.

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[233]

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Q. Mr. Goldman, have you ever had occasion to go into stores that were selling Samara's garments?

A. Yes, I have.

Q. And in what fashion have you seen those garments displayed?

A. The way most of the retailers we sell would display our garments is that they would buy a broad range of styles and silhouettes -- that is, 4 or 5 different sun dresses at the time and put them in bulk to fill up a four-way or fill up a rounder with the product. It kind of stands by itself. It's not something they put 12 pieces in and expect to make money. They really bulk it in the stores and use it for a promotion vehicle.

Q. It might be useful to describe what a rounder is and a four-way.

A. A four-way is a standing rack that would have arms sticking out of it with the products sticking out of each arm. There would be four like almost an X. And the product would be displayed so the whole rack system would be used.

[234] Q. And a rounder?

A. A rounder is a round rack which you don't find that much in the stores today, but just a big circular rack where depending on the size you can fit ten or 20 dozen of the product on the rack at the time per store.

Q. Did the stores ever display the name Samara?

A. Yes, they do.

Q. Where?

A. Sometimes on top of the racks. On some stores it would be -- certain stores it's displayed, well, pretty much above the garments or in ads.

Q. What stores are we talking about when you refer to having seen the garments sold in stores?

A. Anywhere from Bloomingdale's to Uptons to Macy's to Price Club to any of the big major retailers in America.

Q. I would like to show you now what was previously testified about which was Exhibit 38, a document that says Macy's on the front of it.

Could you describe to the jury what Exhibit 38 is?

A. It's a Macy's Memorial Day tab which is a sales bulletin you get in the mail, I guess part of the junk mail or whatever, and it is showing the various items that they have on sale for baby and toddler stock-up sale and they picture a Samara dress with our name in it, a little girl [235] sitting in a chair.

* * * *

Q. If I can ask you now, Mr. Goldman, to look at Exhibits 39 and 40. Are you able to identify the stores responsible for those ads?

A. This is Exhibit 39, Plaintiff Exhibit 39, and again it's an ad with a Samara dress in it with our name in there talking about boys and girls playwear and there is no name on the ad but from this particular ad I can see a private label that they are promoting as well and that would be part of ARG group because that is the label they use, which was in those days I guess Steinbocks, Uptons and Byrons and now it goes all under the name Uptons.

Q. Could you look at the other --

THE COURT: By the way, the private label brand on that is Little Lambs?

THE WITNESS: Little Lambs, yes.

THE COURT: Okay.

THE COURT: Exhibit 40.

A. Exhibit 40 is the same thing. There is an ad showing a Samara boys shortall and a sun dress with our name on it basically and again this is a Little Lambs so I guess it's from one of the ARG stores that I just mentioned before.

[236] Q. Are these the only examples you have ever seen of a store or other advertising using the Samara name?

A. No, it's used all year long with any of the stores that we sell. They kind of buy from us to promote. It's something they usually feature.

Q. If I can ask you one last time to step down from the witness stand and go over to the rack, which I will move closer to the jury and what I would ask you to do, Mr. Goldman, is to compare from a quality standpoint the Samara garments and the Samara lookalike garments sold by Wal-Mart.

A. You can see on these two garments, 1B, which is the Small Steps garments, and the 1A, the Samara, the first one I notice is the collar is done out of different materials. It's done in pin cloth and theirs is done out of broad cloth and the pin cloth is just more expensive fabric to use in the collar. It's probably double the price.

Something else I would notice is that the appliques are also done in twill and theirs is done in broad cloth. Again there is a big difference in the quality of the fabric and the price of the fabric. On this garment particularly it's something we would do in our pockets. We put extra stitches and bar tack them on the corner so when the child puts the hand in the pocket they don't pull it off. This doesn't seem to have

that on it so there is more of a chance of this garment falling apart actually.

[237] Q. When you say "this garment," can you just for the record say --

A. 1B.

The other thing I notice is we use a blind hem on our garments and they use a straight stitch at the bottom and that has to do with the machinery, and the machinery for the blind stitch machine is a little more expensive to operate and own and uses a little more thread. On this type of hem you can pull the hem down and on this one you can't pull the hem down without ruining the garment so if you want to lengthen the garment.

Q. Can I draw your attention to the thread around the applique and the finish of the applique?

A. There is something that we are strict about on the appliques and that is the amount of threat we like to put around the applique, the consistency on every garment, how it's done, it's more thread count on the applique.

Q. More thread count than --

A. 1A would have more than 1B.

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[245]

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Q. Your testimony was that with respect to private label merchandise you have made in `96 private label [246] merchandise for both Belks and Carter?

A. Correct.

Q. Roughly 15 to 20 percent of your production, correct?

A. Correct.

Q. Did the Belks product also have a Samara label on it?

A. No, it didn't.

Q. Did the Carter product also have a Samara label on it?

A. No.

Q. You said Carter gave you appliques, is that correct?

A. Correct.

Q. And you put them on the Carter garments?

A. Yes.

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[251]

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Q. Your counsel asked you a question "do others make products like Samara" and your answer was, if I wrote it down correctly, "not to the extent that we do it."

Do you recall that answer?

A. Yes.

Q. Now, "not to the extent we do it" to me suggests that others in fact do make garments like Samara, is that your testimony?

A. I would say the garments are different, not the same as ours.

Q. Well, when you said "not to the extent we do it," what did you mean?

A. I mean that our whole line coordinates together where other manufacturers might take a seersucker dress and [252] put it in part of an overall line of something that they do of their 70 or 80 different designs they do. They might not concentrate and make a whole like that coordinates together and hangs together. There could be a garment out of 70 in their line that might have more of a feel of ours than the rest of their line. They might not have a complete look.

Q. So with respect to the one garment, however, that garment might look like the Samara garment, that is your testimony?

A. I would say yes.

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[254]

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Q. You testified, sir, that on occasion Samara will take in a dozen garments that have the same silhouette, use possibly as many of four different sets of appliques, correct?

A. Correct.

Q. Can you give us an example of a set of four appliques that would be found in one silhouette?

A. Say in the scalloped collar we can do teddy [255] bears, watermelons, flowers and sailboats.

Q. Is it your choice to put that combination of appliques together?

A. I have part of the decision-making process, yes.

Q. And I guess as opposed to the retailer, does the retailer pick the combination of appliques that are placed in the combo pack or does Samara?

A. No, we do.

Q. So to the retailer, they are buying a combo pack not necessarily knowing what the appliques are going to be in that combo pack?

A. We could tell them because we can go back and look at the invoices and say this particular one we are going to ship has these four appliques in it and we can do that.

Q. On occasion have you --

A If they asked.

Q. And if they don't ask they get whatever combo pack you put together?

A. They get the silhouette of the body with assorted scallops in it.

* * * *

[257] Q. Are you familiar with the Simplicity line?

A. No, not at all.

Q. Are you familiar with the concept of home sewing, making your own clothing?

A. Yes.

Q. With respect to that particular exhibit, do you see a garment that has a watermelon design on it?

A. Yes.

Q. Does it look familiar to you?

A. No.

Q. Does the watermelon look like any watermelon that Samara has ever used?

A. There are many different ways to draw a watermelon.

Q. It has red inside, black seeds and a green rind; correct?

A. Sometimes we do it with a pink inside, a white rind, and green. I mean, there's many different ways you can color them up and make them feel --

Q. Sometimes you do it with a dark green rind, a red interior and black seeds; correct?

A. Yes.

Q. Much like the watermelon depicted on the Simplicity pattern.

MR. REITER: Objection.

[258] A. I don't --

THE COURT: Overruled. You can answer that question.

A. I really don't think so. I think it has its own look, the way this is integrated into a garment.

* * * *

Q. Mr. Goldman, I would like to join your design staff for 10 minutes, if I could. Samara has a pattern that has a scalloped --

A. Collar.

Q. Collar.

And how many scallops are usually there?

A. It all depends on what applique is going into it.

Q. So, some of them have nine scallops. I counted on some of your --

THE COURT: Did you answer that last question?

A. I said it all depends on the applique.

[259] THE COURT: Well, the next question is some of them have nine scallops?

A. I went kind of like shook my head. I haven't been counting them.

THE COURT: All right.

Q. I've drawn a nine-scallop. I'm not probably going to last in your design department very long. But we will see a nine-scallop collar.

And let's say I have an idea and that's I want to do something different this year. I want a snowman applique. Could we do that?

A. Go ahead.

Q. Ever done one?

A. I wouldn't.

Q. You wouldn't do a snowman?

A. No, not on a sundress.

Q. People might want to feel cool. Go with me. Let's say I'm your boss for the day. We'll put one in the center; right?

A. Fine.

Q. Now, do your appliques typically have faces on them? Do you see any faces or do you typically just use a shape?

A. Just use a shape. It all depends on the applique.

[260] Q. We might put a little thread in there. Did you ever think about doing that, three dots of thread?

A. Very rarely, less of a chance.

Q. Then we'll just leave thread on that one. Let's use this scallop; correct? We're going to integrate the scallop into the design; correct? This is part of the copyright process.

So, let's put another snowman here and then we'll put another snowman over here. All right.

Now, is this the Samara look?

A. Not at all.

Q. Why not, because the snowmen --

A. Because it doesn't have the feel. It's not balanced. It has no meaning.

Q. Could we balance it?

A. No. It doesn't -- it's too high. It doesn't have the -- it doesn't balance to the garment. It would be impossible to make it work.

Q. The snowman is too big?

A. It's not the right shape. There's no thought that went into it or the thought that went into it doesn't understand the look that we're trying to achieve.

Q. How long did you think we spent on this, 10 second, maybe 30 seconds?

A. You could have spent three months on it. I don't [261] know.

Q. You saw me do it?

A. Yeah.

Q. How long was it?

A. To draw that, it didn't take you that long.

Q. All right.

Let's try strawberries then. You do use strawberries in spring and summer? Again, I'm not a great artist, but your design people could mix this up. I want to put a strawberry on this scallop. So, I'm going to make the strawberry fat and how many leaves do you think I should put on top?

A. Me? Me personally?

Q. Yeah.

A. I would say an odd number.

Q. Which would you rather do, three or five?

A. Either one.

Q. Could you do it either way?

A. You could do it either way.

Q. Would you want one leaf dropped down?

A. I would like to look at the whole line, not one applique at a time and decide how to pick them out.

Q. It's cross-exam, and I'm allowed a little latitude.

And how many dots do we want to put on?

[262] A. It depends if you want to use dotted fabric or put embroidery thread on.

Q. Let's do embroidery. Is that enough dots?

A. That's fine.

Q. And we'll put one in the center and we'll again put three leaves because you want to have the same number; right? And then we'll put one more over here; right? And we'll -- again, more dots.

Now, granted I'm not a very good artist, but is this the Samara look?

A. From looking at that, no.

Q. Is it because the quality of the art is bad?

A. Could be.

Q. If I had chose five leaves instead of three, would that be the Samara look?

A. That's not what would make the look, if it had three leaves or five leaves.

Q. What would make the Samara look?

A. It's just the feel of the garment. It's something that you have to understand being there doing it for 15 years, caring about it maybe.

Q. Yeah. Would I have to have seersucker with this for this to be the Samara look?

A. No.

Q. Would I have to have any other applique down on [263] the pocket for it to be a Samara look?

A. Not for that particular one; no.

Q. But neither one of these is the Samara look?

A. Well, the way it is there, I mean it could be translated and fixed up and turned into -- I mean, it's --

Q. We could make it work?

A. It could be a copy of the Samara look.

Q. Was I looking at a Samara document when I did that?

A. No, but the garments have been sitting out here all day.

Q. But am I allowed to draw a strawberry?

A. Sure you can.

Q. And isn't that my interpretation of a strawberry?

A. Right. That's your interpretation, but I wouldn't put that on my line and call it the Samara look.

MR. COSTON: Could I have your Exhibit 36?

Q. You still have the McCall's? Does this resemble, in your opinion, the McCall's sample that you have there?

A. No, it has a different feel to it. This is similar -- that is something that is sewn onto the chest of the garment.

Q. Watermelon feature though?

A. Yes.

MR. COSTON: May I approach the witness, your [264] Honor?

THE COURT: Yes.

Is that McCall's, for the record?

MR. COSTON: I'm sorry. Simplicity. Forgive me, 88.

* * * *

Is it your testimony that Samara doesn't like big appliques?

A. Was it my testimony? No. It depends if it's in a collar. I wouldn't want the big applique fitting correctly, but it depends on what type of garment it would go on, because each one has to fit onto the garment correctly.

Q. Did you ever see an applique that's half the size of the body?

A. Yes.

Q. So, a Samara applique can be a big applique, can [265] be this big, half the size of the garment; right?

A. Well, that's not half the size, but.

Q. But here's the top of the --

A. That's probably about 20 percent the size of the body from shoulder to hem.

MR. COSTON: May I approach the witness, your Honor?

THE COURT: Yes.

Q. O.K. Hold up for the jury the length between the bottom of the yoke and the bottom of the --

A. Well, the garment really measures from here to here, not from --

Q. How long would you say that is, about 14 inches?

A. Yeah, somewhere about that.

Q. And then from the bottom of the applique to the top of the yoke, how long is that?

A. Between four or five inches.

Q. It's roughly a third of that garment, if you measure shoulder to bottom?

A. Possibly, somewhere about that.

Q. It takes up a third of the size?

A. Yes.

Q. Now, would you call that a big applique? Is that one of your bigger appliques?

A. Yeah, that would be -- I would say bigger than [266] some and it depends if we have it on our larger size dress, the applique would get 15 to 20 percent bigger, depending on the size of the skirt and what we're trying to achieve on it --

Q. Is part of the Samara look a simple uncluttered applique?

A. Depending on -- that's a hard way to describe it. I don't know. Every applique is different. Every one has been thought out and this particular one, the way it was designed, it was done with a lot of color to pick up the different colors in the dress. So --

Q. I'm sorry --

A. A lot of more design to go with the fabric.

Q. The question was, is the Samara look a simple uncluttered look?

A. Yes.

Q. Are there times when you use cluttered appliques?

A. Not what I would consider cluttered.

MR. COSTON: Could I approach the witness, you Honor, with Exhibit 36G?

THE COURT: Yes.

Q. Could you hold that up so the jury can see that. What's inside the tulip?

A. Print fabric.

Q. So, with this applique, we have a print fabric [267] surrounded by embroidery with a green stem placed on a check pattern; correct?

A. Correct.

Q. Would you call that an uncluttered look?

A. This one, yes.

Q. Including inside the tulip?

A. Yes.

Q. So, this is part of the Samara look of simple and uncluttered?

A. Yes.

* * * *

[273]

* * * *

Q. I don't mean to interrupt. I apologize. The only purpose of the question was the constituent element of [274] the combo pack. In the combo pack that's represented there, had ducks on carts, cars --

A. Boats.

Q. Boats?

A. And --

Q. Whales?

A. Ducks on carts, boats --

Q. I don't want to belabor this --

A. Whales.

Q. Whales.

I'm just trying to shortcut this so when a retailer, buys a combo pack from Samara, unless the retailer specifies what appliques they want, they get your choice of the combo pack; correct?

A. Right.

Q. And really what they're buying in that case is the silhouette that's represented by that combo pack; correct?

A. Yes.

* * * *

Q. I misunderstood your testimony then. Earlier [275] today you said in `97 you kept 100 percent of the line, the Samara look?

A. No. We experiment with 10 percent a year trying to build some new items and new products to see if we can expand our business like anybody would want to.

This year, we decided that instead of going in another direction, we were going to just try to build our own business bigger and do 100 percent of what we do best.

Q. And last year in `96, you had roughly five or 10 percent was your testimony experimentation?

A. Yes. Over the years, it's usually five or 10 percent and those items never seem to get repeated. So, every year we try to develop something new.

* * * *

[279]

* * * *

Q. Now, your experience in the standard of the industry, when you can see on the photographs a supplied to you by the vendor showing the garment that they're going to make that that garment was copied has been manufactured by somebody else and is copied by that manufacturer.

Is it standard to ask no questions about why it's being copied.

MR. COSTON: Same objection, your Honor.

THE COURT: Sustained as to form. Sustained as to form.

Q. Would you have the same trust that the vendor created the document if the vendor's sample of the document had another manufacturer's hang tag on it?

A. I wouldn't trust the vendor.

Q. Would you ask a question from that vendor?

A. Yeah. First of all, I'd want to see their sample, not someone else's garment, something that they're [280] offering to sell me.

* * * *

[281]

* * * *

Q. Up until the facts underlying this case occurred, had anyone manufactured a line that copied exactly the look and feel across the entire line of what you manufactured?

A. Not to my knowledge.

* * * *

[303] Kleist - direct

* * * *

Q. And do you remember at that time you were asked the following questions and gave the following answers beginning at the bottom of page 12:

"Q. Do you know anybody else besides Mayfair and Samara that sold seersucker sunsuits for kids?

"A. Yes.

"Q. Who?

"A. Currently Gelmart does and Cradle Togs does seersucker, more creeper than a sunsuit body.

"Q. Are these manufacturers' lines different from Mayfair's and different from Samara's?

[304] "A. I am not sure how you mean different. It's all seersucker, bodies are very similar, the pattern of seersucker and the appliques are different."

Does that refresh your recollection, Mr. Kleist?

A. I think that is very similar to what I just answered.

Q. So, in fact, it's your testimony that the patterns of seersucker and the appliques that Samara uses are different from Cradle Togs and Gelmart?

A. I did say the patterns of the fabric and the appliques were different between different manufacturers.

* * * *

[316]
January 8, 1997
10:00 a.m.

* * * *

[322] Kleist - direct

* * * *

Q. So you had discussed doing seersucker before you went into the meeting with Mr. Safdieh, correct?

A. Yes.

Q. Thank you.

Now, when you went into the meeting with Mr. Safdieh, can you tell the jury please what transpired? What did he show you? What did you ask for?

A. He came in with several samples, 30, 40 samples, and we looked at them and decided which ones we liked.

Q. Did you ask if Mr. Safdieh could make seersucker garments for you for the Small Steps label?

A. Well, yes, that is what we were looking at was seersucker garments that he could make.

Q. Did some of those samples look familiar to you, that you had seen them before?

[323]A. As a buyer in the market I had seen seersucker samples before, correct.

THE COURT: Hold on a second.

Mr. Kleist, just try to answer his question. It will go faster if you just answer his question. Go ahead.

Q. Isn't it a fact, Mr. Kleist, that at least some of the samples that you saw you recognized as Samara garments because you had bought them when you were a buyer at Sears, isn't that right?

A. Yes.

Q. Okay.

And am I correct, Mr. Kleist, that sitting here today you can't remember whether there were labels in those garments that Mr. Safdieh showed you that you recognized as Samara garments?

A. Correct.

* * * *

[331]

* * * *

Q. And am I correct that the photograph on 10D2 came from Judy-Philippine?

A. Yes, it has their name on the photograph.

Q. Do you know who took the photograph on 10C2? The one that has the photo on top of the Xerox of the photo of 10D2.

A. I don't know but the photograph is dated later than the dates on the quote sheets.

Q. Is it fair to say it was PREL that took that photograph?

A. I don't know for sure –

MS. WAITE: Objection. No foundation.

THE COURT: He said he didn't know anyway.

Go ahead.

Q. Let me see if I can help with that. I would like to read to you from what Susan Patrick testified about a photo on one of her quote sheets.

MS. WAITE: Objection, your Honor.

[332] THE COURT: Sustained. He testified he didn't know.

Q. Mr. Kleist, what is the reason for having a photograph on the quote sheet?

A. It shows the body, silhouette, styling of the garment that we are ordering. It does not show exact details.

Q. Is it fair to say that one of the reasons for having the photograph on the quote sheet is so that you remember when you get back to the United States what it was that you bought?

A. It's style, body, things like that, correct.

Q. But not the appearance on the appliques, Mr. Kleist?

A. Appearance goes to style and body, right?

Q. That is part of it. How about the appliques?

A. Not necessarily. The appliques should be finalized later.

* * * *

[340]

* * * *

Q. You don't have any belief as to whether 34B is based directly on 34A?

A. I would believe that it probably was, yes.

MR. RIBACK: Your Honor, may I show these to the jury?

THE COURT: Yes, you may.

MR. RIBACK: I would like to show 10A and 10B as well, if I may.

THE COURT: Yes.

Q. So it's fair to say that of the four sets of appliques that were on the garments that you purchased, three of them are quite similar to preexisting Samara garments, is that correct?

A. The appliques are similar.

Q. In fact, Mr. Kleist, in the case of the three cars applique and the circus train applique with the animals, they are placed exactly the same way on the garment, isn't that right?

A. Yes.

Q. Mr. Kleist, I would like to ask you if you think Exhibit 8A and 8B are strikingly similar?

A. They are similar, yes.

[341]Q. Mr. Kleist, are they strikingly similar?

A. Yes, they are strikingly similar.

Q. How about 9A and 9B, strikingly similar?

A. Yes.

Q. 1A and 1B?

A. Yes.

Q. 5A and 5B?

A. Yes.

Q. 6A and 6C?

A. Yes.

THE COURT: Did you say 6C?

MR. RIBACK: Yes. 6B is over here.

THE COURT: Alright.

Q. How about 3A and 3B?

A. Similar.

Q. Strikingly so, correct?

A. Yes.

Q. How about 4A and 4B?

A. Yes.

* * * *

[366] Kleist - cross

* * * *

Q. The appliques and embroideries that you referred to, are there any common themes among those?

A. No. Basically in the smaller-size kids, you just want it to be cute. Basically, you know, you're trying to sell a garment to moms or as a gift. In our size range, and it just needs to be cute.

If it detracts from the garment, it will hurt the garment. It is not the sole reason that they buy the garment, but it has to fit the garment and be cute. So, if it takes away, it hurts, but it adds little value to the overall price, value-quality equation.

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[368]

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THE COURT: Just so it's clear, the buying season for spring-summer '98 would be roughly February to August, September of '97?

THE WITNESS: Correct.

* * * *

[377]

* * * *

I have here, for counsel's information, Defendant Exhibits 54, 55, 56, 57, 58, 66, 67, 68, 69, 70, 71, 72 and 73.

MS. WAITE: May I approach, your Honor?

THE COURT: Yes.

Q. I would ask you to take a look at those garments, Mr. Kleist, and tell us if you have seen them before.

A. Yes, I have seen these before.

THE COURT: Actually these are documents and garments because each garment has a slip stapled to it.

MS. WAITE: I stand corrected, your Honor.

A. Yes, I have seen these before.

Q. Where did you see them?

A. Well, besides in court here but I saw them at my office in Bentonville.

Q. And for what purpose were they in your office in Bentonville?

A. Most of them are samples submitted by vendors that they want me to buy.

Q. And these are spring and summer samples, is that correct?

A. Yes.

Q. Over approximately what period, if you recall, did these samples arrive in your office?

[378]A. I don't remember exactly by sample because I get probably 200 samples a week, so it could have come in any week. But most likely the spring and summer samples would have come in after I went to the Orient and I was shopping the domestic market. So that would have been in May, June or July.

Q. And if you wouldn't mind momentarily holding each one of those up briefly for the jury to see and so that we can see them.

A. Keep flipping?

Q. Please.

(Pause)

Q. Do you have any particular method or means by which you can keep track of what garments you have seen and what you haven't?

A. Well, the garments that I buy are put in a separate place from the garments I don't buy but other than

remembering things, it's difficult. Like I said, I get 200 samples a week.

* * * *

[390] Kleist - redirect

* * * *

Q. So predominantly the Small Steps comes from overseas, correct?

A. Yes.

Q. And it's to that that you pay more attention than the items that you buy domestically, correct?

A. Yes.

* * * *

[394] Kleist - recross

* * * *

THE COURT: What was your recollection with respect to the garments that you were shown in Singapore with respect to labels.

THE WITNESS: Like I said earlier, there were 20, 30, some number of seersucker samples. I don't remember which ones had labels, which ones did not have labels. There were probably some with labels and some without labels.

Q. Did you recognize any of these garments as being [395] Samara garments?

A. I recognized the Samara type of look but do I know if they had Samara labels in them, no.

* * * *

[398] Patrick - direct

* * * *

Q. What's your current position with Wal-Mart?

A. I buy newborn, infant, girl apparel.

Q. And how long have you been doing that?

A. I've been doing that for two years.

Q. Two years at Wal-Mart; right?

A. Yes.

Q. And how long have you been involved with little girls' clothing for one employer or another?

A. For the past two years in this size range.

[399]Q. You've been doing some kind of children's clothing since about 1983 or so?

A. Yes, I've been in the children's industry for 13 years as a buyer.

* * * *

[403]

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Q. Can you describe please for the jury what happened in your meeting with Mr. Safdieh?

A. At that time, he was bidding on our books that we send overseas. So, we went through the product that he was interested in, style by style and also at the end of that session, we also look at new offers from different vendors.

Q. And did Mr. Safdieh offer you anything that wasn't in the trip book that you brought with you?

A. Yes, he did.

Q. What did he offer you?

A. Seersucker.

Q. And what kind of seersucker did he offer you?

A. It was a variety of styles, both the newborn and infant playwear.

Q. Did he have samples with him?

A. Yes, he did.

Q. And did you recognize any of those samples?

A. As far as recognize them and –

Q. Did they look to you like any manufacturer's product?

A. I had seen, you know, styles out there, as I had shopped the stores and it reminded me of several people's.

Q. Such as?

A. Samara being one, Gehnart, Mayfair, Cradle Togs.

Q. All of whom make seersucker garments for children; correct?

A. Yes, they do.

Q. Did you on that occasion ask Mr. Safdieh why the garments that he was showing you looked so similar to other manufacturer's garments?

A. I don't recall.

Q. Did you ask Mr. Safdieh whether he had checked with the manufacturers to see to it that the garments he was offering you didn't infringe some other company's copyrights?

A. I do rely on my vendors to check on the copyrights as well as myself. I try to check on every garment, you know, looking in the labels for the copyright, but I don't remember specifically all of those styles.

* * * *

[414]

* * * *

Q. Ms. Patrick, is Exhibit 3C a quote sheet for Style No. S96IG453?

A. Yes, it is.

Q. And could you read the description on the left-hand side of the photograph to the jury?

A. It says, "Girls' seersucker stripe yarn-dyed [415] dress and panty and assorted finished applique on yoke and skirt ruffled fly sleeve, two big white chalk buttons on back strap."

Q. Am I correct that it says "with assorted fruit applique"?

A. I thought that's what I read, yes.

Q. And a strawberry is a fruit; is it not?

A. A strawberry is considered a fruit.

Q. Now, if you look down at the bottom of the page, there's a reference to two options. Option one, butterflies; option two, strawberries and fruits?

A. Yes, it is handwritten.

Q. Do you know which option Wal-Mart chose?

A. Not without going back through some folders; no.

Q. I show you what is marked as Exhibit 3B and I'll ask you if looking at that garment helps you remember which option Wal-Mart chose for the applique on S96IG453?

A. According on the mint color, we would have done fruits.

Q. Which is the strawberries?

A. Yes, it is strawberries.

Q. I'll hand you what we marked earlier, which is the 3C2, which is the original of 3C. And if you look at that photograph that you say was generated by PREL, do you see the photograph?

[416]A. Yes.

Q. Is there a hang tag on the garment that's in the photograph?

A. There does appear to be one, yes.

Q. And what does it say on the hang tab?

* * * *

[419]
January 8, 1997
10:00 a.m.

* * * *

[423]

* * * *

Q. We have gone through six style numbers at this point, correct?

A. If you say so, six.

Q. To your knowledge, Ms. Patrick, is there a single one of those six style numbers that doesn't have a Samara garment that looks substantially similar to it, strikingly similar to it?

A. What was the question?

Q. For any of those six style numbers is there any of them that does not have a Samara garment that is [424] strikingly similar to it?

A. You have produced two garments of Samara that are, yes, strikingly close, but for the other styles I wouldn't know.

Q. 6A as against 6B?

A. It does have a collar with hearts on it, yes.

Q. Strikingly similar, correct?

A. It's similar.

Q. Is it strikingly similar, Ms. Patrick?

A. I can tell the difference in them

THE COURT: The question really ought to be answered yes or no. Are they strikingly similar? If you can.

A. They are similar, yes.

THE COURT: Okay.

Q. 5A and 5B, Ms. Patrick, are they strikingly similar?

A. They are similar, yes.

THE COURT: You know, you are not answering the question. The question is are they strikingly similar, yes or no?

THE WITNESS: Yes.

Q. 1A and 1B, are they strikingly similar?

A. Yes.

Q. 3A and 3B, are they strikingly similar?

[425]A. Yes.

Q. 4A and 4B, are they strikingly similar?

A. Yes.

Q. 33A and 33B?

A. Yes.

* * * *

[426]

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Q. And what did you learn about copying other people's work?

[427]A. Well, I know we are not supposed to do it.

* * * *

[430]

* * * *

Q. These are Defendant Exhibits 50 through 65. Have you seen these garments before, Ms. Patrick?

A. Some of them look familiar, yes.

Q. Do you know where you might have seen them?

A. I have garments coming into me all the time. Every week I get garments into my office, so it could have been something that was sent in to me.

[431]Q. Can you give us any type of estimate about how many garments you might see in the course of a week?

A. Several hundred.

* * * *

[433]

* * * *

Q. Do you have any knowledge about how these garments would actually be displayed in a Wal-Mart store?

A. It depends on the store but, yes, we have several racks in our stores. It could have been on a four-way, which is a rack that has actually four arms, and if you double hang there are eight arms, or what we consider a circle rack, which is exactly what it is, a round rack. And usually in the infant department it's double hung so it's one over the other. Or the third way would have been on what we call an A track, which is usually a four-foot rack and it has bars double hung.

Q. If the garments were displayed on either the double rack or the circular rack, would the appliques be visible to the consumer without close inspection?

A. Not on a circle rack, absolutely not. On the four-way the only thing that would be visible would be your first arms. So you would really have to get in and pull out in order to see the applique and this would hold true on our A tracks.

[434]Q. Do you know whether or not there was any particular display associated with the Judy-Philippine goods, the seersucker goods?

A. Not to my knowledge, no. We sent out directions to the stores to try to pull all 888 together on a rack where they could. That is why each store would have been a little different depending on the quantity they had. So nothing was sent out and pulling seersucker together.

Q. Was there any particular signage associated with these goods?

A. No, there was not.

Q. What type of signs would typically appear over the racks?

A. Usually we use a price point sign or we would have done a generic photograph of a child in an 888 outfit but it wouldn't necessarily have been a seersucker, and then underneath that the stores would have put the price point in time and in every case the stores don't put up the photograph signs. It's left up to the individuals stores.

Q. Do you have knowledge as to whether any of these goods or any of the Judy-Philippine seersucker goods were advertised in any way by Wal-Mart?

A. No, they were not.

Q. You know that they were not?

A. They were not photographed in any ads.

* * * *

[444]

* * * *

Q. As an experienced buyer of children's clothing, if you saw the products without labels with hang tags, would you be able to distinguish the difference between a Samara garment and a Gelmart garment perhaps?

A. Not necessarily.

Q. In your opinion, would the average consumer be able to make such a distinction?

MR. RIBACK: Objection, your Honor.

THE COURT: Would the average consumer be able to distinguish between a Samara and a Gelmart garment if they didn't have labels on them?

MS. WAITE: In her opinion, your Honor.

MR. RIBACK: Your Honor, it's objectionable. It asks for expert testimony, among other things.

THE COURT: Overruled.

You can answer, for what it's worth. You can answer.

A. It's in my opinion that, no, a person would not know the difference without being able to read a hang tag or a label.

* * * *

[446]

* * * *

Q. Ms. Patrick, you can't see anything about the [447] garment other than less than an inch of the sleeve when it's on a full circle rack. Isn't that right?

A. And color.

Q. And color.

So, in order to see what the garment looks like, it has to be removed from the circle rack; right?

A. Yes.

Q. And once it's removed from the circle rack, the entire construction of the garment and its entire appearance is apparent to the consumer; right?

A. Yes.

Q. Have you ever known a consumer to buy a garment without looking at it first to buy it only on the basis of that less than an inch that shows of the sleeve around it?

A. Not normally; no.

Q. Have you ever known people to buy garments in stores without looking at the appearance of the garment first?

A. Not to my knowledge, no.

Q. And the appearance of children's clothing that we're talking about includes the applique; correct?

A. Applique is part of the garment; yes.

Q. And when a garment is hanging on a four-armed rack that's shaped like a X?

A. Yes.

[448]Q. In fact, the full front of the garment is visible to people. Isn't that right?

A. Yes, that's what I testified to; yes.

Q. Now, when you were at -- strike that.

You made a reference to reinterpreting the garments that show up on the photographs that come back to your office. Do you remember that testimony?

A. Yes.

Q. Were the garments in this case reinterpreted?

A. They did not appear to be; no.

Q. They were, in fact, copied. Isn't that right?

MS. WAITE: Objection, your Honor.

THE COURT: Overruled.

You could answer that question.

A. It appears that the vendor did copy very similar to some of the Samara garments.

Q. And what the vendor delivered to you matched up perfectly with the descriptions on the purchase orders for the garments that flowed through the quote sheets that you participated in filling out. Isn't that correct, Ms. Patrick?

A. Those are the garments that Judy-Philippine sold to me as new offers from overseas; yes.

Q. Ms. Patrick, I'll ask the Court Reporter to read the question to you so you can answer it.

[449] THE COURT: Yes.

(Record read)

A. That's correct, yes.

* * * *

[454]

* * * *

Q. This is Wal-Mart Trial Exhibit 54.

Ms. Patrick, do you think that if the label was taken out of that garment, you would ever think that was a Samara –

A. Not really.

* * * *

[456]

* * * *

Q. Not to belabor matters, Ms. Patrick, but you took it on good faith that the sample that's shown in this photograph was an independent creation of Judy-Philippine?

MS. WAITE: Objection, your Honor.

He's never established that she ever saw that.

MR. RIBACK: She identified it before.

THE COURT: Don't. Don't. Don't. Don't.

Have you seen that? Did you see that document before?

THE WITNESS: I have seen.

THE COURT: The original of it?

THE WITNESS: I have seen the original document.

THE COURT: When was the first time that you saw it?

THE WITNESS: It would have come to me two to -- it could have been anywhere from two weeks to two months after I left the Orient.

THE COURT: Objection's overruled.

You can answer the question.

THE WITNESS: What was the question?

Q. You had testified earlier that this was a [457] PREL-created photograph?

A. Yes, it is.

Q. That was created for your records after your buying trip?

A. Yes.

Q. So that you would know what you bought; correct?

A. Yes.

Q. And did you believe in good faith after looking at this photograph that was created for your records that the garment shown there was an independent creation of Judy-Philippine?

A. Yes, I did, at that time.

Q. Notwithstanding the Samara label hanging over it, which is clearly visible?

A. I don't remember having a Samara label on that garment at the time I actually saw the merchandise. You're asking me to identify a picture. I see actual merchandise and I don't remember having a Samara label or hang tag.

Q. But when the photograph that you needed for your records came back to you, there was a Samara label on it; correct?

A. Yes, there is.

* * * *

[481]
January 9, 1997
9:35 a.m.

* * * *

[514] THE COURT: I think Mr. Coston's point is we need actual confusion on the part of consumers.

MR. COSTON: Yes, sir, on the trade dress.

MR. REITER: I feel uncomfortable responding to that.

THE COURT: Is there any evidence on the part of consumers? I don't think so.

MR. REITER: There is no direct evidence of actual confusion. Again, I think it's something the jury could infer.

[533]

* * * *

"Q. Can you tell me the differences, to your mind, between Samara's spring and summer children's [534] seersucker clothing and the spring and summer seersucker clothing with appliques these other companies make?

"A. Okay. Samara spring-summer clothing has very large, colorful, distinct full appliques. The placement of the appliques are such that it's an integral part of the design. They use probably a little better fabrics and their clothes are very classic. The lines to the clothes are very clean. They use the same bodies, pretty much year in and year out. Baby Togs and Mayfair would have smaller application. They are not nearly as large or distinctive. A lot of times they are extracted out of a print. If the skirts are a print they will extract part of that applique out of a print where Samara does not. Samara's appliques are totally a focal point design of the dress.

"Q. Is it fair to say that you can recognize a Samara without looking at the label?

"A. Very easily.

"Q. How can you do that?

"A. Because the appliques are so distinctive and in a lot of cases they use the same type appliques year in and year out. They use the same continuity of fabrics and pretty much the same body [535] styles.

"Q. Is it just the applique that identifies the Samara garment to you?

"A. No, it's the whole, the way it's placed. It's the fabric and the applique and, again, the simplicity of the design. They don't put a lot of lace or chachki stuff on it.

"Q. To your knowledge, do consumers associate that look of the Samara garment which you have just described with the name Samara? Go ahead.

"A. I can answer that?

"Q. Yes.

"A. Yes, when it has the Samara label for all these years and they have been buying it for their children and grandchildren I think the customers can definitely tell it's the Samara.

"Q. To your knowledge, do store buyers associate the clothing with that look with the Samara name?

"A. Very definitely."

* * * *

[540] "Hamilton

* * * *

"Q. What I am going to be asking you now is whether the particular garment that I'm showing you has the Samara look, irrespective of who made it; O.K.?

"A. Fine.

[541]"Q. What we marked as Exhibit 1, does this have the Samara look?

"A. No. Yes."

MR. RIBACK: Well, it's no.

THE WITNESS: Yes.

MR. COSTON: Just, your Honor, I object.

That's not an accurate reading.

THE COURT: Let me see it. I really should have copies of all these,

MR. REITER: If you look at the bottom of 14 and the top of 15.

THE COURT: Just for the record, the bottom of page 14, why don't we read it again, starting at line 23.

MR. RIBACK: Of page?

THE COURT: Page 14, starting at line 23. Let's read from there through the top of page 15, line 4.

"Q. What we marked as Exhibit 1, does that have the Samara look?

"A. No. Yes.

"Q. That is for Exhibit 2."

MR. COSTON: Your Honor, I object to the way this is being read.

THE COURT: Well, it's not clear to me what happened.

Ladies and gentlemen, it's just not clear from [542] the transcript.

MR. RIBACK: Your Honor, may I approach because I took the deposition?

THE COURT: Well, I understand that, buy you're in the a witness. The problem is that -- and I'm not saying that the way you have just read it is not accurate. I think there is some ambiguity in the transcript.

The transcript could be read a couple of ways. And just so that the record is clear, ladies and gentlemen, beginning

at the bottom of page 14, this is the way the transcript reads. It says:

"Q. What we marked as Exhibit 1, does this have the Samara look?

"A. No. Yes.

"Q. That is for Exhibit 2. What we marked as Exhibit 3?

"A. Yes."

Now, we'll leave it to the jury to interpret what happened there. It goes to show you and a good example of what we've been trying to do throughout this trial is to make it clear so when one reads the transcript after the fact, you can follow what's going on.

And as we sit here now, it's not 100 percent clear precisely what happened.

But, in any event, let's pick up with page 15, [543] line 8.

"Q. What we marked as Exhibit 4?

"A. Yes.

"Q. What we marked as Exhibit 5?

"A. No.

"Q. Exhibit 6?

"A. No.

"Q. Exhibit 7?

"A. Yes.

"Q. Exhibit 8?

"A. The body style does, but I'd say no.

"Q. And Exhibit 9?

"A. Yes."

* * * *

[548]

* * * *

"Q. Turning to Samara's clothing, in your experience, are the appliques in Samara's clothing always identical?

"A. No.

"Q. Are they identical to each other? Is it always the same picture?

"A. Is it always the same applique?

"Q. That's right.

"A. In some cases, yes.

"Q. Can you give me an example?

"A. I believe their watermelon-colored sundresses would be a good example of an applique which is the entire color of the garment that they have carried for years. They have pocket placement that they carry, strawberries on the pockets. They may be a whole pocket.

You have strawberries that they cared for years. They have boats for years, sailboats in particular. You mentioned tools. They continually have uses for the tools as appliques; apples, cherry.

"Q. Trucks?

"A. Trucks, butterflies.

"Q. Do they do circles and squares, just [549] abstract circles and squares?

"A. I don't think I've seen much of that.

"Q. Hearts? Do they do hearts?

"A. They do hearts.

"Q. Do think do trains?

"A. I have seen trains.

"Q. How about airplanes.

"A. Definitely airplanes.

"Q. But they could have a variety of applications, not always airplanes?

"A. No. Like I said, they have pretty extensive lines. So, they have a lot of appliques going at any one time.

"Q. Of the 40 or 50 that you say you see when you go to look at a line in the showroom, there's usually a large variety there. Is that what you're saying?

"A. That's correct.

"Q. In your experience, are the appliques that we're talking about commonly placed in certain locations on infants or children's garments?

"A. In the case of Samara, they are. In the case of the other people, their placements can be different. They're not as a part of the total design as Samara's is.

* * * *

[557]

* * * *

"Q. Is your understanding of the Samara look based solely on the applique that Samara uses?

"A. The Samara look is a combination, not only of the appliques, but plus the quality of the fabric they use. It's where

they place the appliques and it's a combination of a clean look. It all goes to incorporate what we consider a Samara look. It's not just appliques.

"Q. Is it just applique on seersucker?

[558]"A. No."

MR. RIBACK: Moving to page 38, line 7.

"Q. Now, prior to your deposition today, had I told you what I would be showing you during the course of the deposition in terms of actual garments?

"A. You did not.

"Q. Before I did the second round of questioning about the garments after explaining to you the question, did I tell you what answers I expected or which garments were which?

"A. I did not.

"Q. So, is it fair to say then that you had no idea what I was hoping to hear from you before –

"A. I had no idea. That's why I misunderstood your question."

* * * *

[588]

* * * *

THE COURT: I think we have answers to all the questions.

First, the Perfect Fit case is very clear. There must be actual confusion of the public. In fact, it specifically says that evidence of confusion on the part of retailers is evidence of the likelihood of such confusion but not necessarily evidence of actual confusion. So I have made that change and I will charge

them that they must find actual confusion on the part of consumers. That is one question.

The second question was with respect to the unfair competition claim, the fourth claim, and the question was whether it had to be actual confusion or likelihood of confusion. There is a Second Circuit case that makes it clear that it is actual confusion, not just likelihood of confusion, and that case is WWW Pharmaceutical Company versus Gillette, 984 F.2d 567, 1993. It's a Second Circuit case. At page 576 it says that "the state law cause of action for unfair competition shares many common elements with the Lanham Act claims of false designation of origin and trademark infringement, including proof of actual confusion to recover damages."

[589] And so I have amended the unfair competition charge to reflect that. We have copies of the amended charge for you, and the amended verdict sheet.

The unfair competition charge that I have just been discussing is on page 24 and so I also changed the special verdict sheet, question 16 on page 6, "Did Wal-Mart's actions cause confusion in the minds of consumers?"

Actually we should put the date on the front of my charge, January 9th.

We are ready to go then?

Bring in the jury.

* * * *

[592] Coston - summation

* * * *

The Samara people are nice people. They took the stand, told the truth. I respect them. Wal-Mart respects them as a company. I tried to treat them with respect and dignity in

examining them because that is what I feel for them. But Wal-Mart is not a bad guy. And that is how they have tried to position the case.

* * * *

[603]

* * * *

Count 3 is a count under New York law. It's essentially a consumer protection statute. Is there again something misleading to consumers? Count 4 is another common law count which requires actual confusion. Counts 2, 3 and 4 are very, very similar. In fact, Samara's counsel in its opening referred to them as basically different ways of putting the same ideas into legalese. So I submit that whatever you decide on Count 2, the trade dress, will determine the outcome of Counts 3 and 4.

* * * *

[634]

* * * *

If you bought that clothing, if you saw it as you have now for several days, there would be no question in your mind what looks like it and what doesn't and that's what makes it protectable.

Samara's purpose in maintaining that, as Mr. Goldman testified to, is that he looks at all these designs and he insures that they are consistent with the look. He said to you that it is important for Samara to retain that look because that's how it sells its product.

It sells its products to customers and to retailers who know that when they see it, it's a Samara, that they can go in and year after year, it's going to retain that look. It's a look that

they spent all their time perfecting and maintaining and they've been doing it for 10 years.

I submit to you that that clothing is inherently distinctive. Your own eyes tell you it is distinctive.

* * * *

[664] CHARGE

* * * *

What is trade dress? Trade dress is an expansive concept that includes the overall appearance of a product, including its size, shape, color, texture, graphics, labels, packaging or other visual features. These elements combine [665] to create the total visual image by which the product is offered to customers as a symbol of the product's origin. In other words, trade dress is the total image or overall impression of a product.

The trade dress of a commercial product has two fundamental purposes. One objective is to protect the property rights of a trade dress owner by maintaining control over a product's reputation and goodwill. In this regard, trade dress acts as an authentic seal that vouches for the origin and quality of a particular product.

But a selected trade dress has another important purpose. It also protects consumers from being misled as to the nature and source of the products they buy. Consumers are entitled to know what they are buying and, in connection with brand name products, they are entitled to expect the same product from the same source even if they cannot identify the business or company that makes or sponsors the product.

Protectable trade dress rights are the exclusive property of the trade dress owner. On this basis, no other company can use a trade dress that is likely to cause confusion,

mistake or deception as to the course of commercial goods. In other words, a trade dress owner has the right to stop a competitor from using a trade dress that is confusingly similar to the owner's protectable trade [666] dress.

When packaging a competitive product, a second comer in the market has an affirmative obligation to adopt a trade dress that does not cause confusion with the protectable trade dress of any earlier, existing products.

To succeed on its claim for damages for trade dress infringement, Samara must prove two elements by a preponderance of the evidence:

First, that the trade dress of its designs is legally protectable; and

Second, that the trade dress of the Wal-Mart product you are considering is so similar to the protectable Samara Brothers' trade dress that it caused actual consumer confusion.

The first element.

To be legally protectable, a product's trade dress must be distinctive, meaning that it is either inherently distinctive or that it has acquired a secondary meaning in the marketplace.

Distinctiveness.

To be distinctive, a product's trade dress must be capable of identifying the producer or source of the product and distinguishing the product from the competition, even if consumers do not know the name of the source. There are two ways that a product's trade dress can be [667] distinctive. First, it can be inherently distinctive and, second, it can become distinctive by acquiring a secondary meaning in the marketplace. In assessing the distinctiveness of the trade dress of Samara's designs, you should consider the appearance of the

trade dress as a whole, rather than focusing on a single aspect of its design.

Trade dress features that are commonplace or customarily used to package products in a given industry are generally not distinctive so as to set the goods of a particular seller apart from the competition.

Moreover, trade dress law does not protect ideas or concepts, but only their expression. The overall inquiry in determining whether the trade dress is distinctive is whether the trade dress identifies the source of the product.

A trade dress is inherently distinctive if its intrinsic nature serves to identify a particular source of the product. An inherently distinctive trade dress is one that is likely to serve primarily as a designator of origin of the product, taking into consideration the nature of the trade dress and the context in which it is used. In determining whether the trade dress is inherently distinctive, you should consider the combination of elements forming the product's overall appearance.

[668] A trade dress that is arbitrary or fanciful is always inherently distinctive. A trade dress that is suggestive is also inherently distinctive. A trade dress is suggestive if it suggests rather than describes the characteristics of the product, requiring the purchaser to use his or her imagination, thought and perception to determine what the product is. In contrast, a trade dress that is descriptive, meaning that it describes the qualities or characteristics of the product, is not inherently distinctive but may become distinctive by acquiring secondary meaning in the marketplace. In determining whether the trade dress of Samara's designs is inherently distinctive, you should consider the combination of elements forming the product's overall appearance rather than examining each element separately.

Before I define secondary meaning, let's take a seventh inning stretch.

(Pause)

A product's trade dress will become distinctive by acquiring secondary meaning where the purchasing public has come to associate the trade dress as a single source or producer of the product, even if the name of the source is not known. In other words, Samara must show that the trade dress of its designs has, over time, become identified with about its producer in the minds of potential customers. [669] Factors to be considered in determining whether a product's trade dress has acquired secondary meaning include: plaintiff's advertising expenditures; consumer surveys linking the trade dress to a particular source; sales success; unsolicited media coverage; attempts to plagiarize the trade dress; the length and exclusivity of the use of a trade dress; and advertising, promoting and association between the product and the source of the product.

Intentional copying also constitutes evidence of consumer recognition and secondary meaning, although it does not by itself conclusively establish secondary meaning. Rather, evidence of intentional copying must be considered together with all the evidence in the case.

Samara has the burden of proving secondary meaning. The mere fact that Samara is using its trade dress, or that Samara began using it before Wal-Mart, does not mean that it has obtained secondary meaning. There is no particular length of time that trade dress must be used before it obtained a secondary meaning.

That completes the first element.

If you find by a preponderance of the evidence that Samara has proven that the trade dress of its designs is legally protectable, you must then consider the second element: actual

confusion. Samara must prove by a preponderance of the evidence that the allegedly infringing [670] trade dress of the Wal-Mart product caused actual consumer confusion.

Actual confusion may be shown by, among other things, testimony from consumers who are actually confused by the trade dress or by market surveys demonstrating actual consumer confusion.

Even if you find that Samara did not prove actual confusion, you may presume that there was actual confusion if Samara shows that Wal-Mart engaged in intentional deception. That presumption is a rebuttable one, and hence, if you find that Wal-Mart engaged in intentional deception, then the burden will shift to Wal-Mart to show by a preponderance of the evidence that there was no actual confusion. In that case, if Wal-Mart shows that there was no actual confusion, it will have met its burden to rebut the presumption and you must find in favor of Wal-Mart in this respect. If Wal-Mart does not show an absence of actual confusion in the face of proof of intentional deception, then Wal-Mart will not have rebutted the presumption and you must find in favor of Samara in this respect. Remember, however, that Samara must first show that Wal-Mart engaged in intentional deception to give rise to the presumption of actual confusion.

That completes the second claim.

* * * *

[684]

* * * *

Members of the jury, that concludes my instructions to you. I will ask you to remain seated while I confer with the attorneys to see if there are any additional instructions that they would like me to give or to see whether I misread anything or whether I left anything out.

So just be patient for one more moment while we have one final side bar out in the hall.

[685] (Side bar conference)

THE COURT: You do not need to repeat any of the prior objections or suggestions that I rejected. Those are deemed already made. If you want to add anything else I will be happy to listen.

MR. REITER: Your Honor, there was a word used improperly, and you read it faithfully, on page 30 in the second full paragraph in the last sentence two lines from the bottom "giving rise to a presumption that Samara succeeded in its intent to confuse consumers by adopting Samara's trade dress."

THE COURT: You are looking at the old one.

MR. REITER: Trade dress.

THE COURT: Trade dress damages?

MR. REITER: Which is B.

THE COURT: I have it. Samara succeeded in its intent. I will clarify that.

MR. REITER: Thank you, your Honor.

THE COURT: Anything else from plaintiff?

MR. REITER: No, your Honor.

THE COURT: Wal-Mart?

MR. COSTON: On elements of the copyright claim ownership, you had previously corrected the word to be "designs and arrangements" and I should have been more attentive and realized that the word "applique" continues on [686] in that instruction and that "applique" throughout should have been "design and arrangements."

Having said that I am not sure that it's anything that really --

THE COURT: The only thing I could possibly say is that some of the designs don't involve appliques. I don't know.

MR. COSTON: That would be fine, or they look at the registration to determine the scope of the copyright claim.

THE COURT: I will instruct them in considering the designs and what was copyrighted they should look at the registrations, which are the exhibits, which we will send in automatically even if they don't ask for them.

MS. WAITE: Somehow I didn't notice this, and it apparently got dropped out somewhere, any reference to the fact that trade dress cannot be merely functional in order to be protected, and we seem to have somehow lost that altogether.

THE COURT: On the top of page 20 it says, "Trade dress features that are commonplace or customarily used to package products are generally not distinctive."

I don't know I ever saw functional but, in any event, it's certainly something I would have included.

MS. WAITE: I have our proposed jury charge [687] number ten. It's very short, just one paragraph, two sentences.

THE COURT: Is there an objection if I say trade dress cannot be merely functional?

MR. REITER: No objection.

THE COURT: I will say that. Anything else?

MR. COSTON: No, sir.

(In open court)

THE COURT: There were three quick things. At one point when I read my charge I read a sentence where I said "Samara" when I should have said "Wal-Mart." The sentence was "Alternatively, you may find that Wal-Mart's actions were intentionally deceptive, giving rise to a presumption that" -- and I said "Samara succeeded in its intent to confuse" and obviously I meant that "Wal-Mart succeeded in its intent to confuse consumers by adopting Samara's trade dress." I think in context the error would have been obvious but just to make that clear. That is number one.

Number 2, trade dress to be protectable is not functional, and I don't know if it's clear in the context. In my discussion of what was protectable I said that trade dress features that are commonplace or customarily used to package products in a given industry are generally not distinctive enough to be protectable, and likewise trade [688] dress features that are merely functional are generally not distinctive enough to be protectable.

The third thing was simply an instruction that in considering the designs and what is copyrighted, you should of course look at the descriptions that are contained in the registrations and we will send them in right away, that is, Plaintiff Exhibits 1 through 11 and 13 and 14. If there is anything else that you want if you can remember all the numbers or just describe the categories we can send in whatever else you would like to see.

I think what you should do, before you do anything, is send back a note telling me how late you want to work today and if you don't finish today whether you want to come back tomorrow or you would rather just wait until Monday. So pick a foreperson, answer those two questions and write down your answers on a piece of paper and send this back out.

Counsel, anything else?

MR. REITER: No, your Honor.

MR. COSTON: No, your Honor.

* * * *

[695]
January 10, 1997
10:00 a.m.

* * * *

[701]

* * * *

Q. Jurors listen to your verdict as it stands recorded. Has the jury agreed upon a verdict?

A. Yes, I have.

Q. One, copyright infringement claim. Does Samara [702] own a valid copyright with respect to the following designs:

Plaintiff Exhibit 1?

A. Yes.

Q. 2?

A. Yes.

Q. 3?

A. Yes.

Q. 4?

A. Yes.

Q. 5?

A. Yes.

Q. 6?

A. Yes.

Q. 7?

A. Yes.

Q. 8?

A. Yes.

Q. 9?

A. Yes.

Q. 10?

A. Yes.

Q. 11?

A. Yes.

Q. 13?

A. Yes.

[703]Q. 14?

A. Yes.

Q. With respect to each of the designs for which you have found that Samara owns a valid copyright, that is, for those designs for which you ever answered "Yes" to Question 1, did Wal-Mart infringe Samara's copyright?

Plaintiff Exhibit 1?

A. Yes.

Q. 2?

A. Yes.

Q. 3?

A. Yes.

Q. 4?

A. Yes.

Q. 5?

A. Yes.

Q. 6?

A. Yes.

Q. 7?

A. Yes.

Q. 8?

A. Yes.

Q. 9?

A. Yes.

Q. 10?

[704]A. Yes.

Q. 11?

A. Yes.

Q. 13?

A. Yes.

Q. 14?

A. Yes.

Q. Question number 3: Was Wal-Mart's infringement wilful?

A. Yes.

Q. Question number 4: What sum, if any, do you award Samara for actual damages?

A. Zero.

Q. Question number 5: What sum, if any, do you award Samara for Wal-Mart's profits?

A. $912,856.77.

Q. Part 2, trade dress infringement claim. Was Samara's trade dress protectable?

A. Yes.

Q. Question number 7: Did Wal-Mart infringe Samara's trade dress?

A. Yes.

Q. Question number 8: Was Wal-Mart's infringement of Samara's trade dress wilful?

A. Yes.

[705]Q. Question number 9: What sum, if any, do you award Samara for actual damages?

A. Zero.

Q. Question number 10: What sum, if any, do you award Samara for Wal-Mart's profits?

A. $240,458.53.

Q. Part 3, deceptive practices claim.

Question number 11: Did Wal-Mart engage in deceptive practices with respect to Samara's designs and trade dress in a materially misleading respect?

A. Yes.

Q. Question number 12: Was Samara damaged by Wal-Mart's deceptive practices?

A. Yes.

Q. Question number 13: Were Wal-Mart's deceptive acts wilful?

A. Yes.

Q. Question number 14: What sum, if any, do you award Samara for damages?

A. $50.

Q. Part 4, unfair competition claim.

Question number 15: Did Wal-Mart misappropriate a commercial advantage that rightfully belonged to Samara?

A. Yes.

Q. Question number 16: Did Wal-Mart's actions cause [706] confusion in the minds of consumers between Samara clothing and Wal-Mart's clothing?

A. Yes.

Q. Question number 17: Did Wal-Mart act in bad faith?

A. Yes.

Q. Question number 18: What sum, if any, do you award Samara for actual damages?

A. Zero.

Q. Question number 19: What sum, if any, do you award Samara for Wal-Mart's profits?

A. Zero.

THE CLERK: Please be seated.

THE COURT: Poll the jury.

(Jury polled)

* * * *

[707]

* * * *

MR. COSTON: Your Honor, we would like to renew the motions made during the trial and ask the court for some time to prepare the post trial motion for judgment notwithstanding the verdict or what is now called –

THE COURT: Judgment as a matter of law.

Your motions are deemed made.

How much time do you need to submit something?

MR. COSTON: Can we have three weeks, your Honor?

THE COURT: Alright, three weeks.

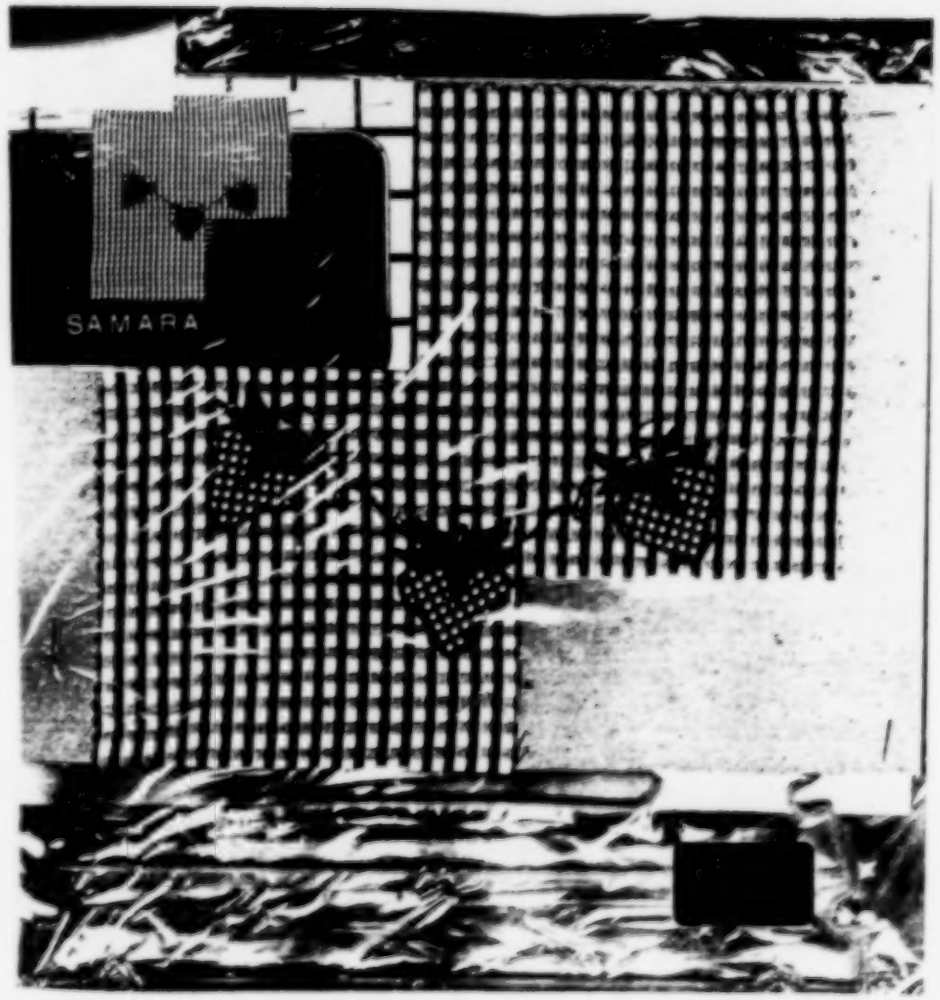
I think under the circumstances before I require a response I will take a look at the papers first. I have a pretty good handle on the evidence and the law, so if I want a response I will let the plaintiffs know. Otherwise I will await your brief in three weeks.

* * * *

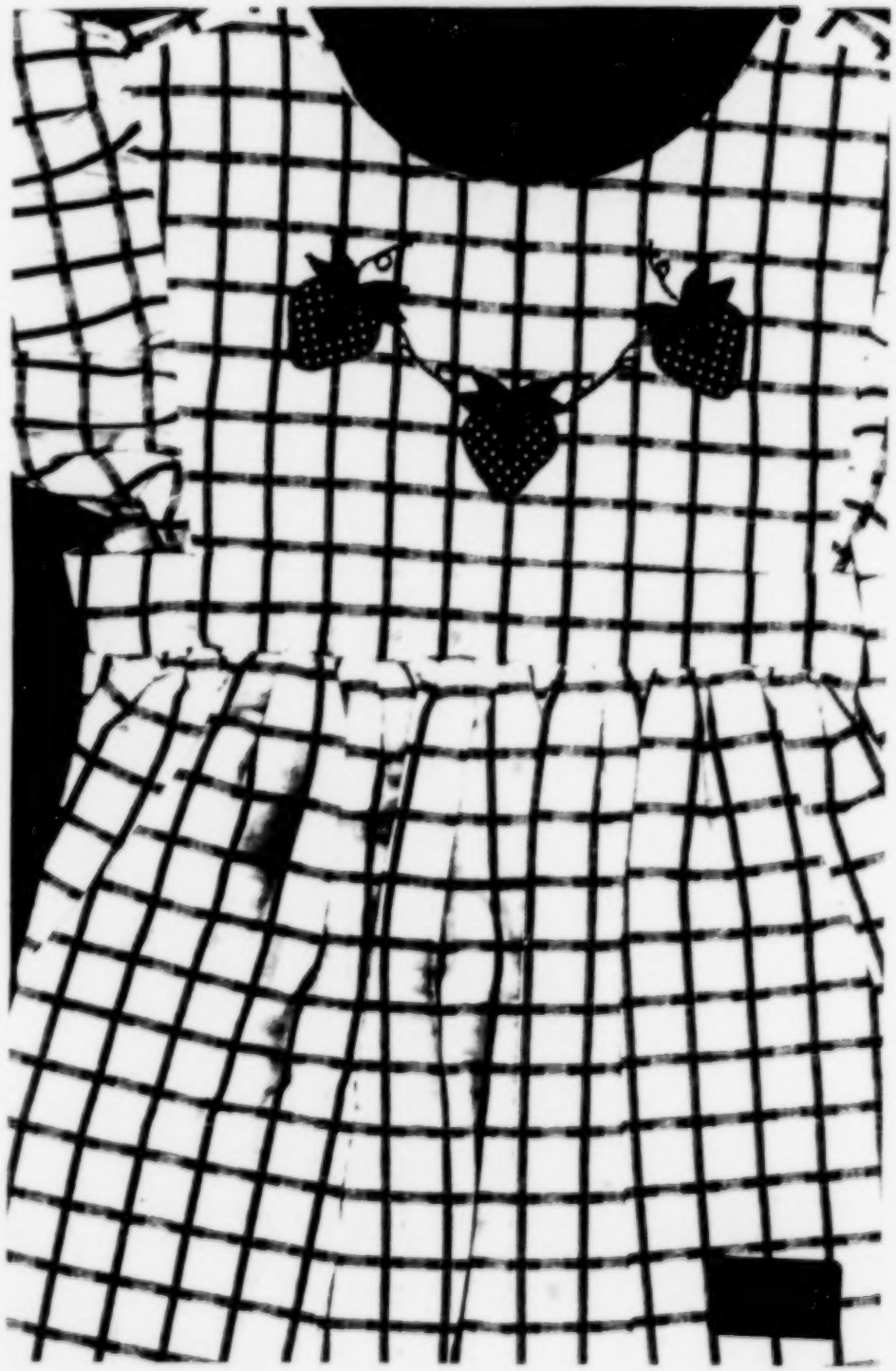
Plaintiff's Exhibits 1A, 3A, 4A, 4C, 5A, 6A, 8A, 9A, 10A, 32A, 33A, 36A – 36N, 36R, 37A – 37O can be found at page JA-287 of this Joint Appendix, annexed to the Judgment of July 2, 1999.

Plaintiff's Exhibit 1B

Plaintiff's Exhibit 2A



Plaintiff's Exhibit 2B



Plaintiff's Exhibit 3B

JA-160

Plaintiff's Exhibit 3C2

PLAINTIFF'S EXHIBIT 3C-2

WAL-MART / QUOTE SHEET – SOFTLINES

SHIP DATE & QTY FOR PATTERN / COLOR / SIZE ASSORTMENT

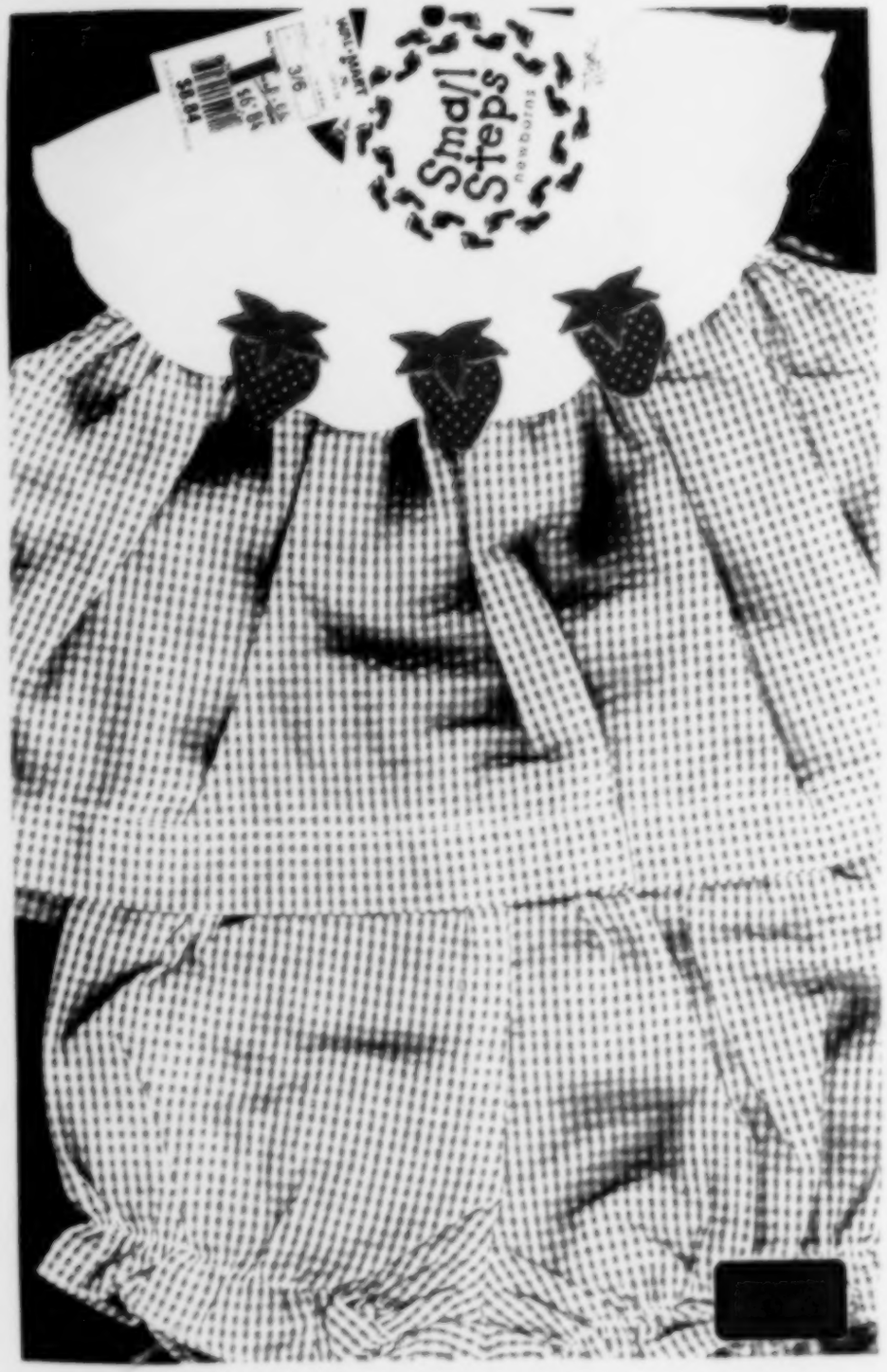
option 3 - Butterfly

2 - Strawberries + Grapes

Body

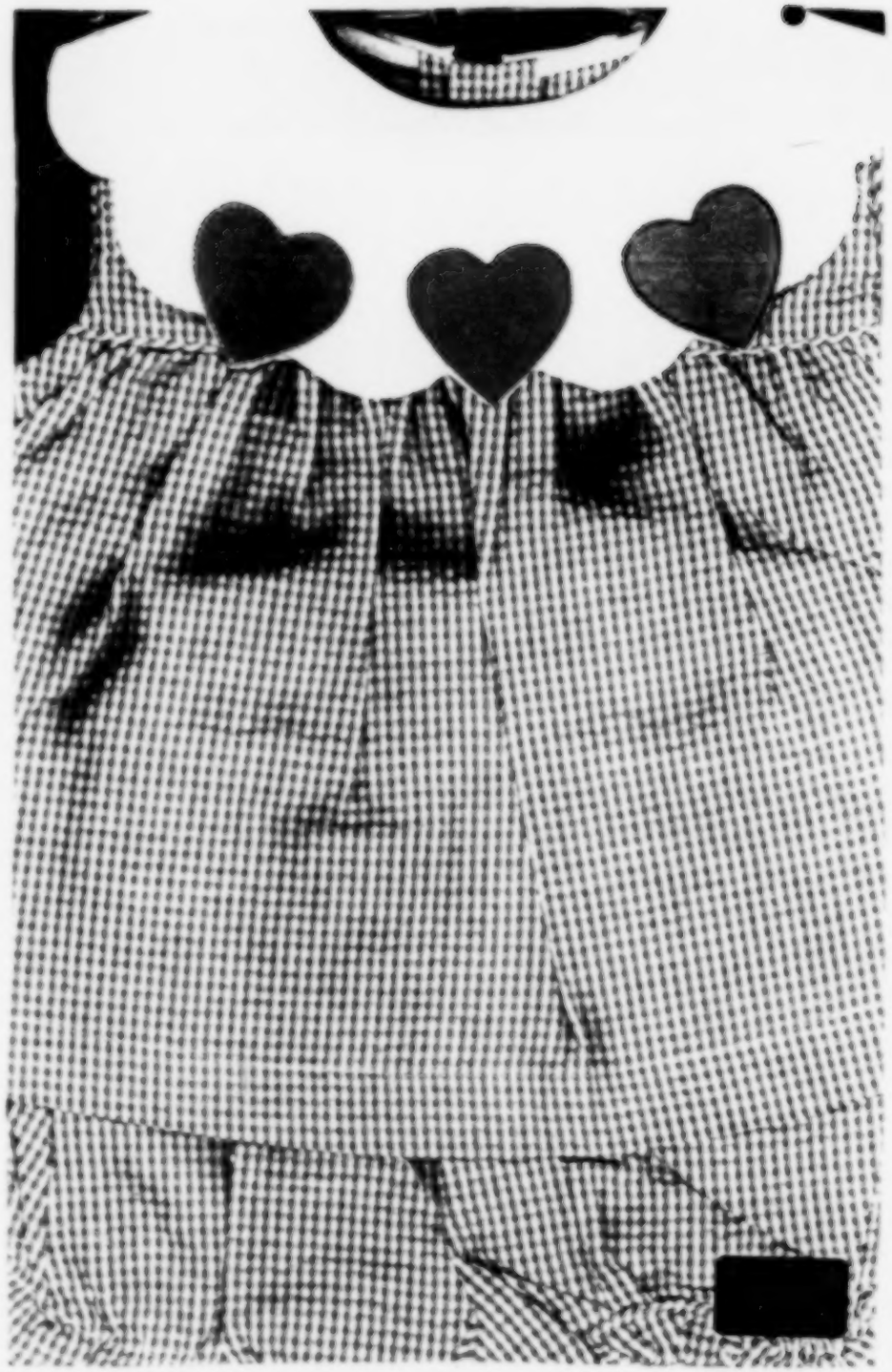
Plaintiff's Exhibit 4B

Plaintiff's Exhibit 4D

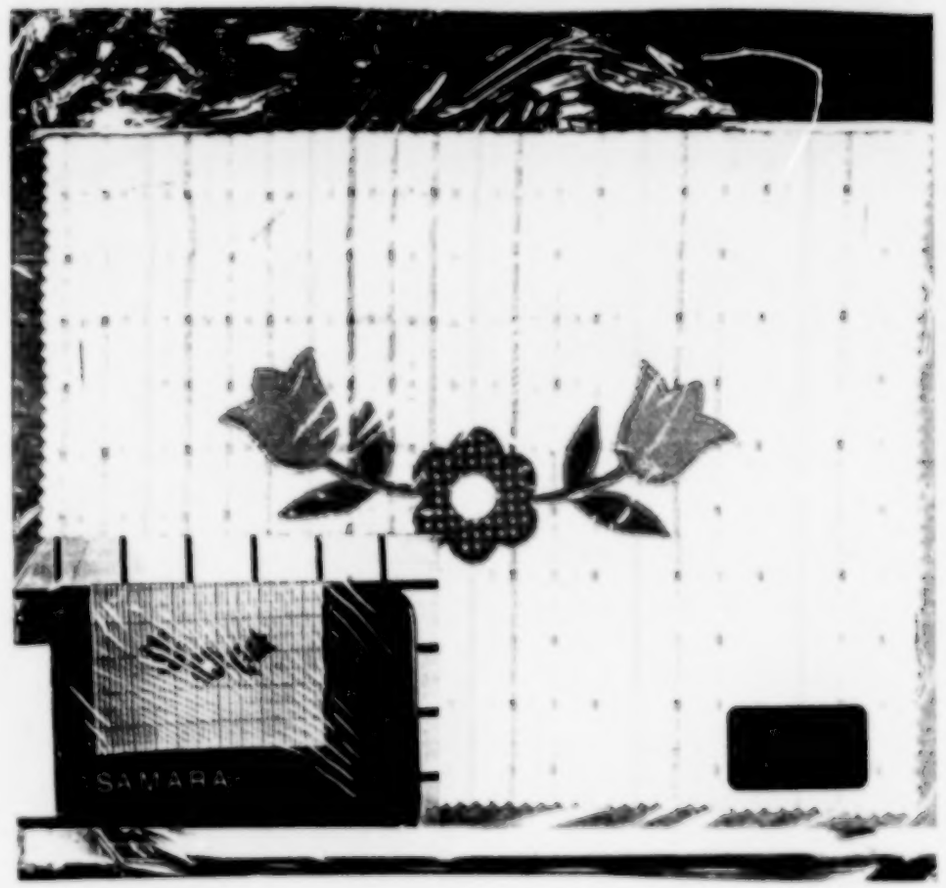


Plaintiff's Exhibit 5B

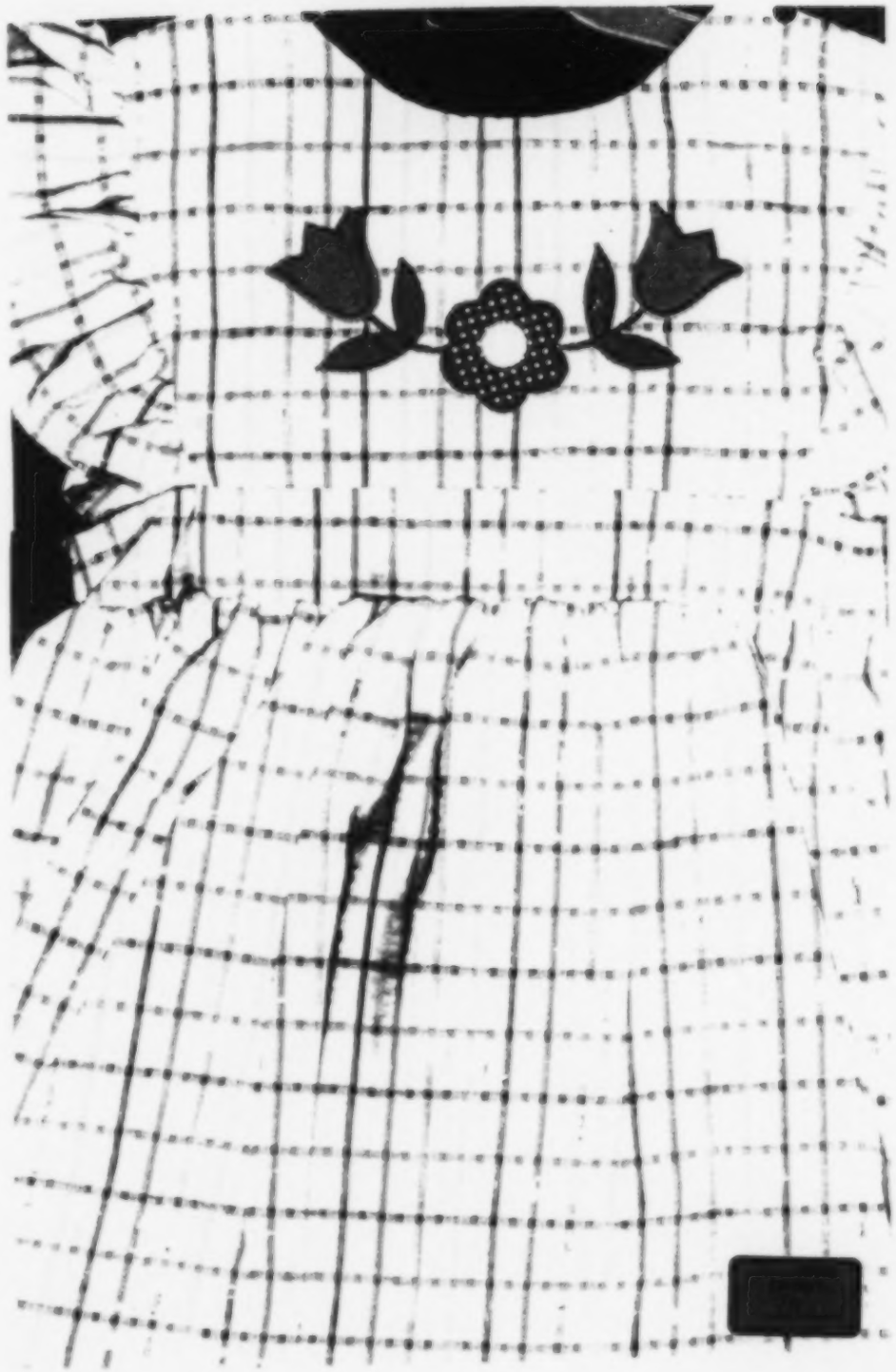
Plaintiff's Exhibit 6B



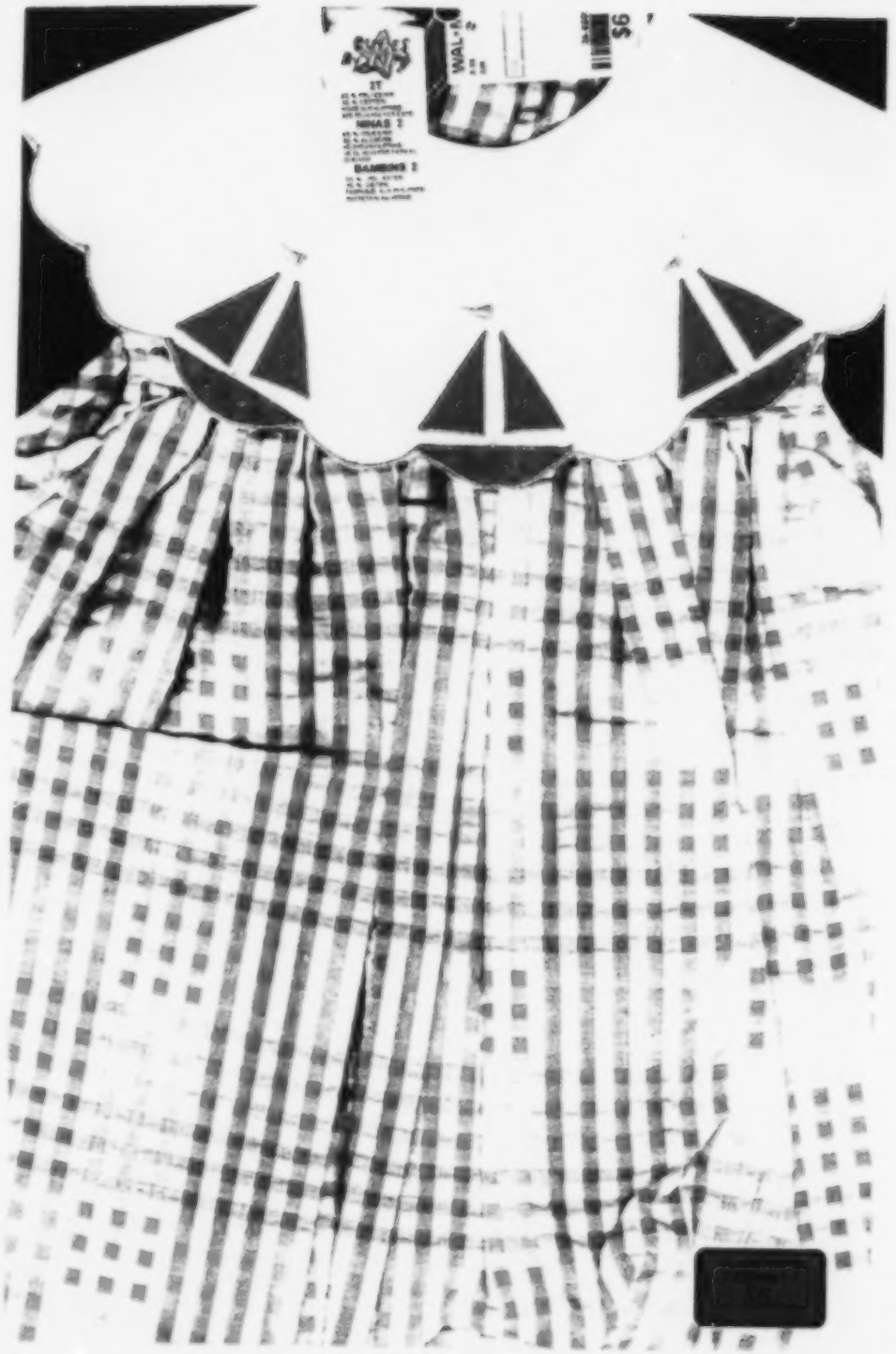
Plaintiff's Exhibit 7A



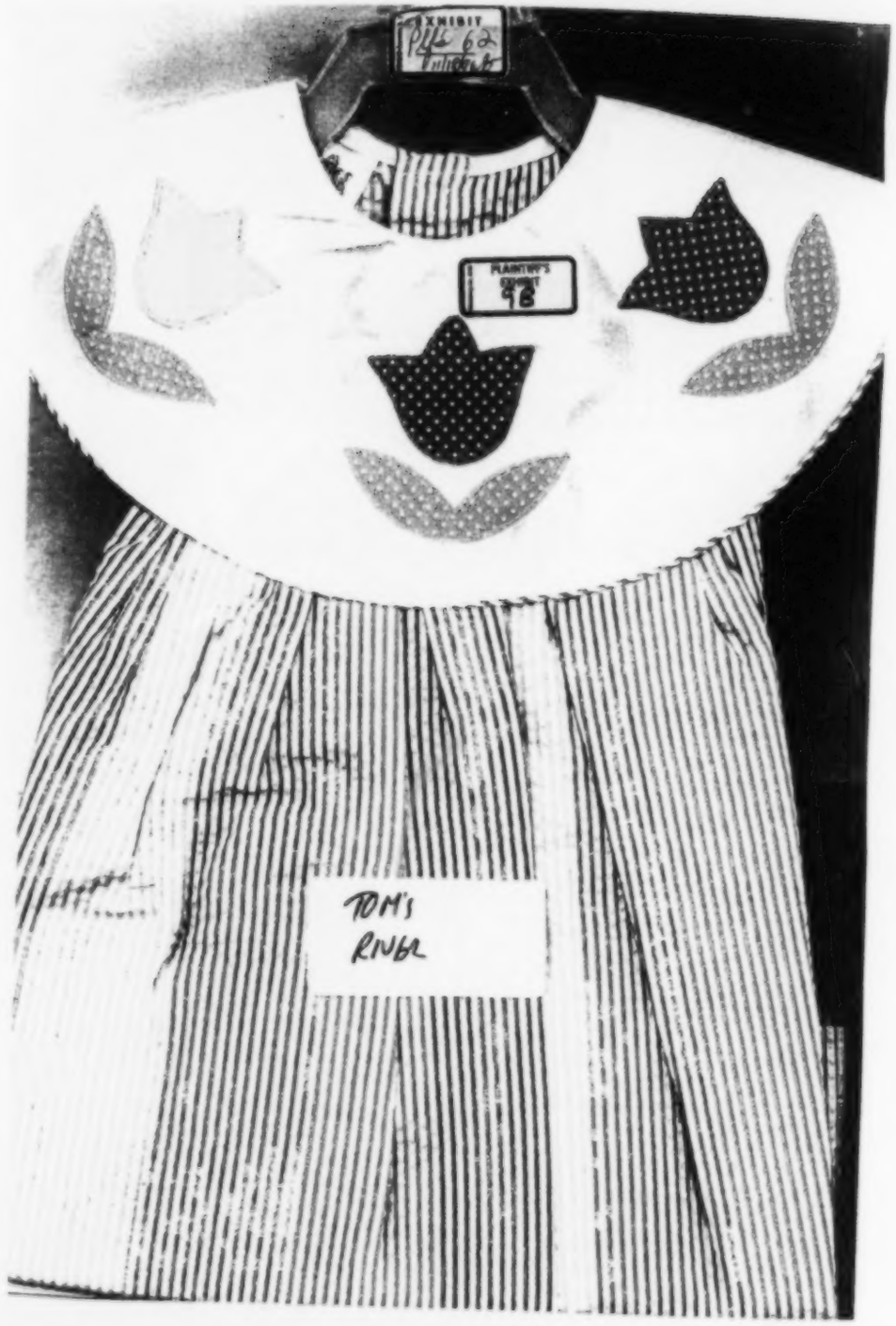
Plaintiff's Exhibit 7B



Plaintiff's Exhibit 8B

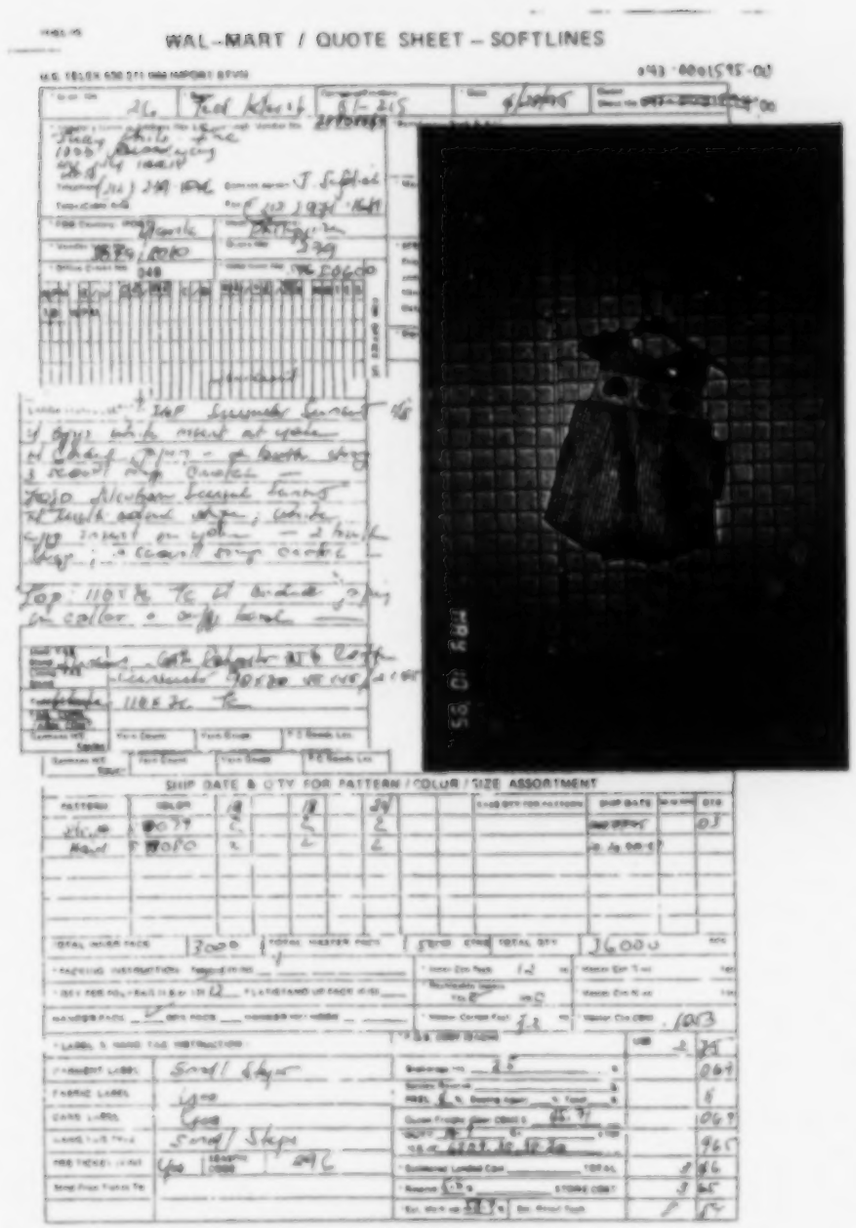


Plaintiff's Exhibit 9B



Plaintiff's Exhibit 10B

Plaintiff's Exhibit 10C2

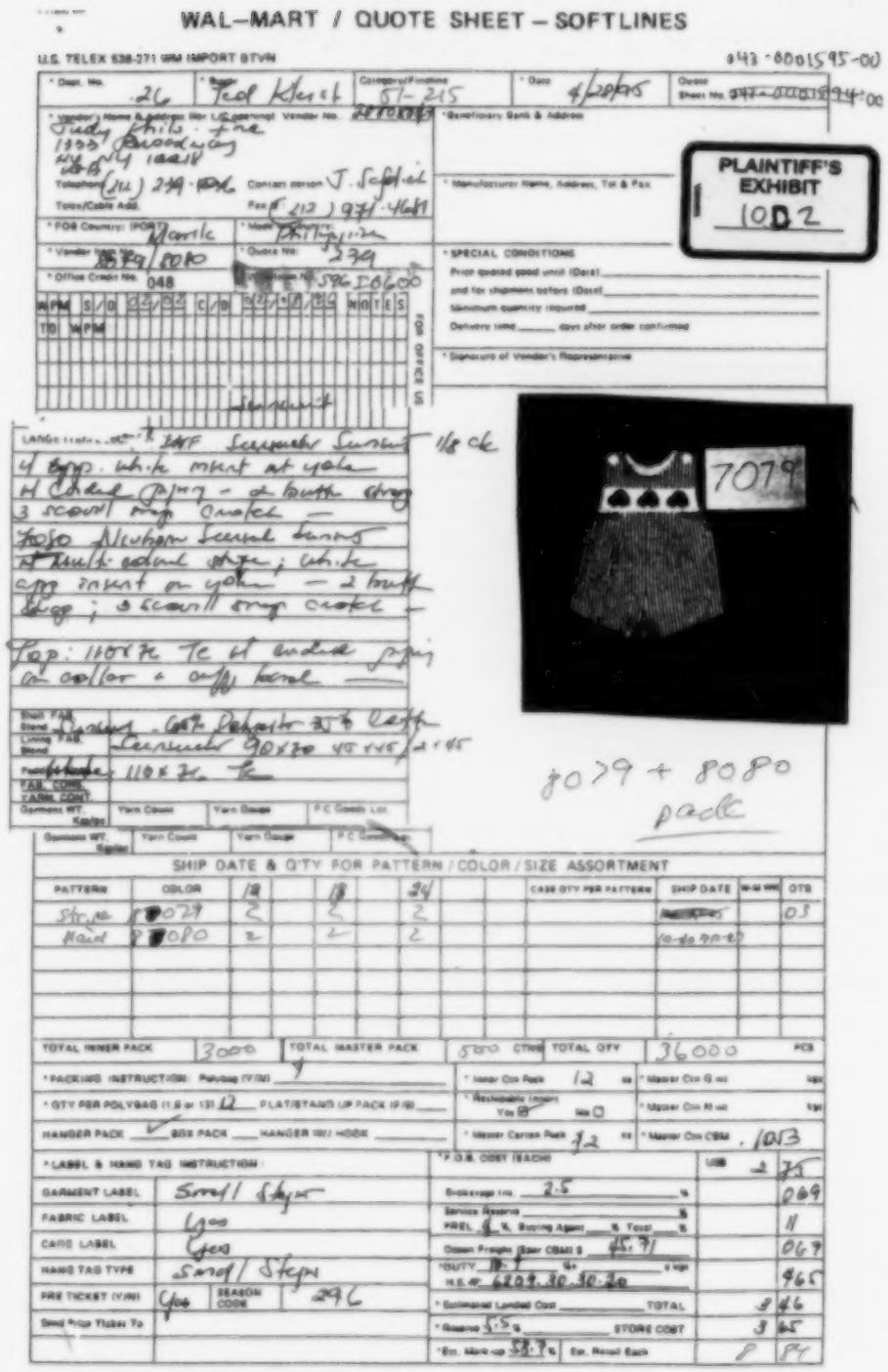

WAL-MART / QUOTE SHEET – SOFTLINES

SHIP DATE & QTY FOR PATTERN / COLOR / SIZE ASSORTMENT

PLAINTIFF'S EXHIBIT 10C2

JA-171

Plaintiff's Exhibit 10D2



WAL–MART / QUOTE SHEET – SOFTLINES

U.S. TELEX 538-271 WM IMPORT BTVN

043-00015995-00

* Dept. No.	* Buyer	Category/Fineline	* Date	Closed
26	Teal Klesh	57-215	4/28/95	Sheet No. 043-00015994-00

* Vendor (Name & address like L/C opening) Vendor No. 2270083
Judy Phils Fine
1333 Broadway
NY NY 10018
Telephone (212) 239-1006 Contact person J. Schlesinger
Telex/Cable Add. Fax (212) 971-4689

* Beneficiary Bank & Address

* Manufacturer Name, Address, Tel & Fax

PLAINTIFF'S EXHIBIT 10D2

* FOB Country (POO) Manila | * Mode Ship/Air

* Vendor Style No. 8579/8080 | * Quote No. 379

* Office Order No. 048 | * Telephone No. 586-1600

* SPECIAL CONDITIONS
Price quoted good until (Date) _____
and for shipments before (Date) _____
Minimum quantity required _____
Delivery time _____ days after order confirmed

* Signature of Vendor's Representative

W/PM	S/O	C/O	T/O	NOTES
TD W/PM				

FOR OFFICE USE

LANGUAGE: * 2 PKF Seersucker Fashion 1/8 ck
4 Bags white mount at yoke
H Shank Spring - 2 button strap
3 scout snap closure —
7050 Newborn Seersucker Fashion
at Multi colored stripe; white
cap mount on yoke — 2 button
strap; 3 scout snap closure —
Top: 110x76 TC H embroid spray
on collar + cuff band —

Shell Fab. Blend: Poplin - 65% Polyester 35% Cotton
Lining Fab. Blend: Seersucker 90x70 45 x 45 2 x 45
Pocketing: 110 x 76 TC
FAB. CONS. YARN CONT.
Garment WT. Kg/doz | Yarn Count | Yarn Gauge | F.C. Count Loc.
Garment WT. Kg/doz | Yarn Count | Yarn Gauge | F.C. Count Loc.

7079 + 8080 pack

SHIP DATE & Q'TY FOR PATTERN / COLOR / SIZE ASSORTMENT

PATTERN	COLOR	12	18	24			CASE QTY PER PATTERN	SHIP DATE	W/M WK	QTD
Stripe	7079	2	2	2				[illegible]		03
Plaid	8080	2	2	2				10-20-20-20		

TOTAL INNER PACK 3000 | TOTAL MASTER PACK 500 CTNS | TOTAL QTY 36000 PCS

* PACKING INSTRUCTION: Polybag (Y/N) Y
* QTY PER POLYBAG (1,2 or 12) 12 FLAT/STAND UP PACK (F/S) ____
HANGER PACK ✓ BOX PACK ____ HANGER (W) / HOOK ____

* Inner Ctn Pack 12 ea | * Reshippable (Import) Yes ☐ No ☐
* Master Carton Pack 12 ea | * Master Ctn CBM 1013

* LABEL & HANG TAG INSTRUCTION:

GARMENT LABEL	Small Stripe
FABRIC LABEL	Yes
CARE LABEL	Yes
HANG TAG TYPE	Small Stripe
PRE TICKET (Y/N)	Yes SEASON CODE 296
Send Price Ticket To	

* F.O.B. COST (EACH)

Brokerage Inc. 2.5 %		
Service Reserve ____ %		
PREF. ____ % Buying Agent ____ % Total ____ %		
Ocean Freight Base CBM $ 45.71		069
*DUTY 16.5 % Ad ____ Sp ____		11
H.S. # 6209.30.30.20		965
* Estimated Landed Cost ____ TOTAL	$	46
* Reserve 5.5 % ____ STORE COST	$	25
* Est. Mark-up 59.7 % Est. Retail Each	$	99

Plaintiff's Exhibit 10H

BOM STYLE: 263-06314 V. 1 DATE OF 6/29/92 REVISED 2'30

COLORS: 1, 2, 3 - 4 (#4)

CATEGORY: 209 SIZE RANGE: 3/6 | 6/9 | | | SIZE: RATIO: 4 | | 8

MATERIALS (for one dozen garments):

#8
#9
(Use the BOM for #9)

FABRICS: | QTY

Pincord - Combo #1 & #4 — Sunsuit body
Seersucker - Combo #2 & #3 — Sunsuit body
Pincord front yoke - All Combos as per attached sketch (white)
Broadcloth - white - 1/2 yoke linings front & back

ACCESSORIES, TRIMS:

label - joker / Case
label - Carter's neck label | 12
Price tickets - Carters | 12
buttons - 301 Chalk White | 24
Cording - front yoke piping - Combo # 2, 3 & 4 - SELF (piping)
snaps - white - crotch | 30 s
Hangers - 12" | 12

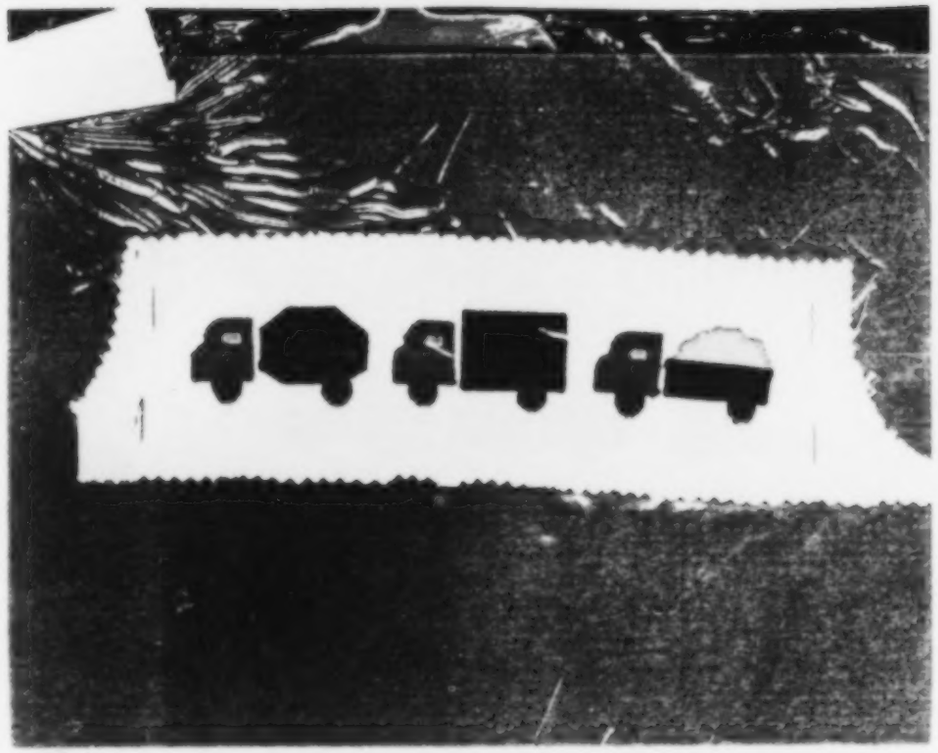
PACKING METHOD:
dz/washippable box

REMARKS:

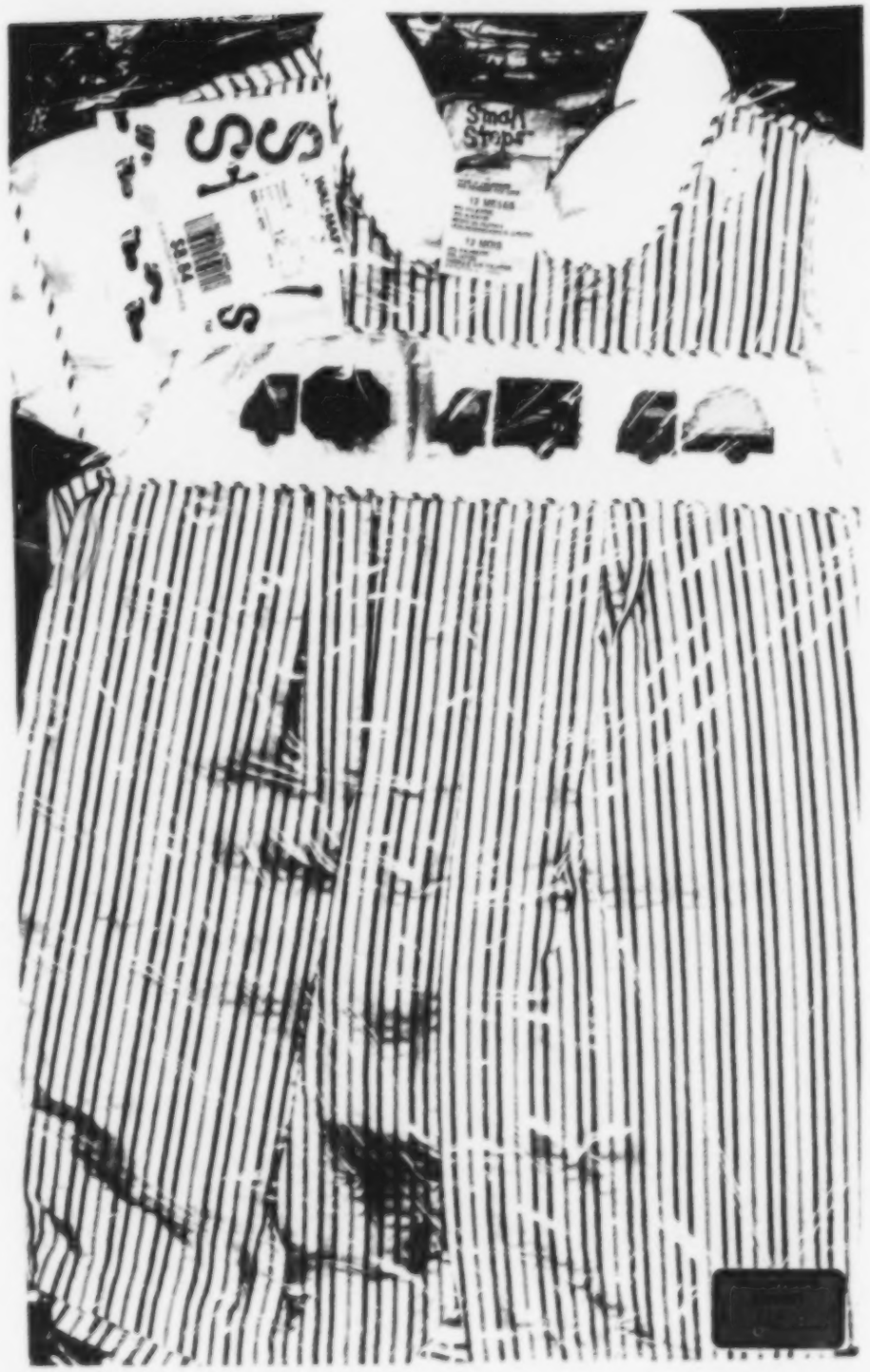
(1) Buyer will supply necklabel.
(2) Assort 3 pcs. per Combo.
(3) There are to be NO hangtags on these garments.
(4) Buyer will supply price ticket.
(5) Mail boxes Carters

PLAINTIFF'S EXHIBIT 10H

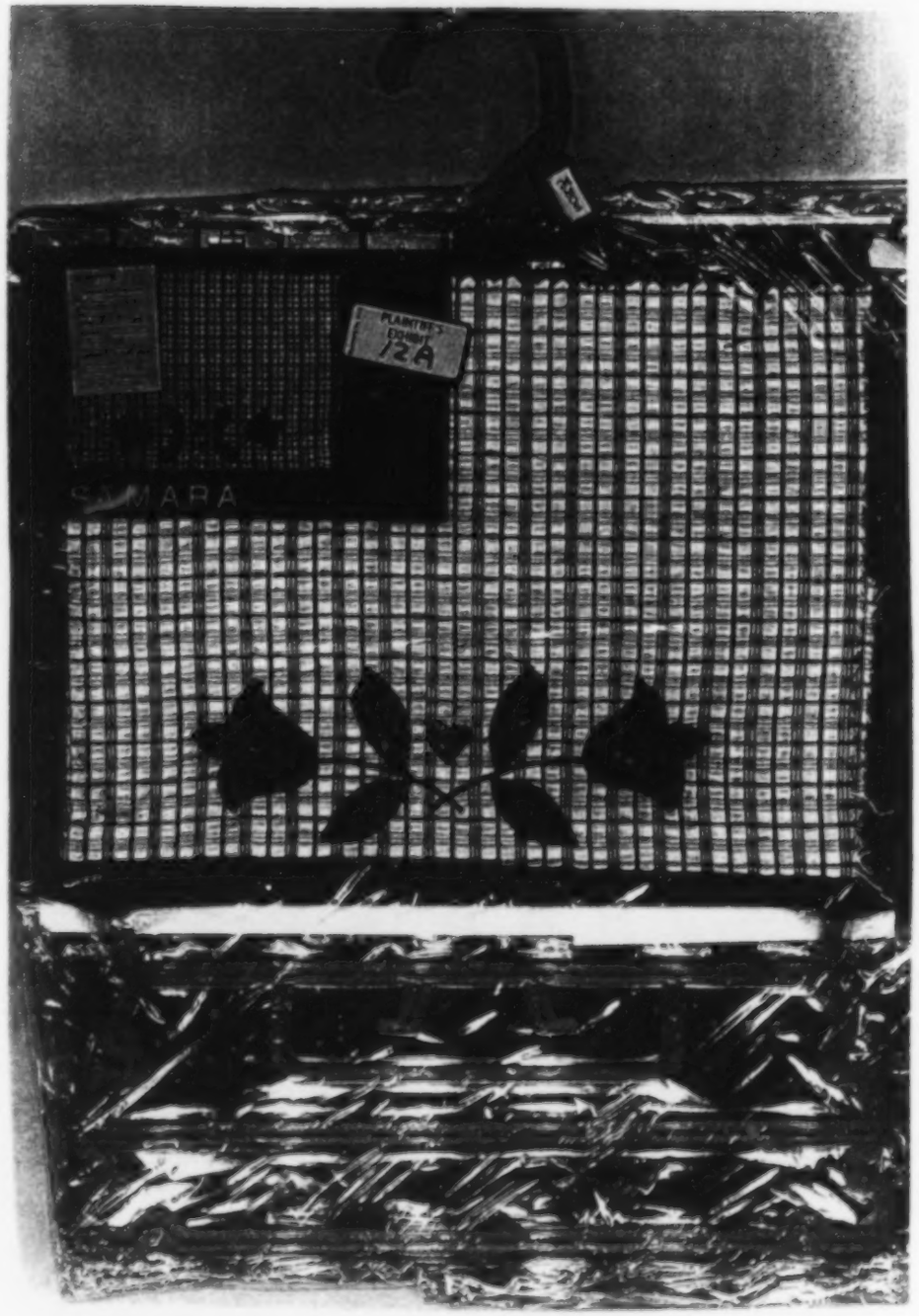
Plaintiff's Exhibit 11A



Plaintiff's Exhibit 11B



Plaintiff's Exhibit 12A

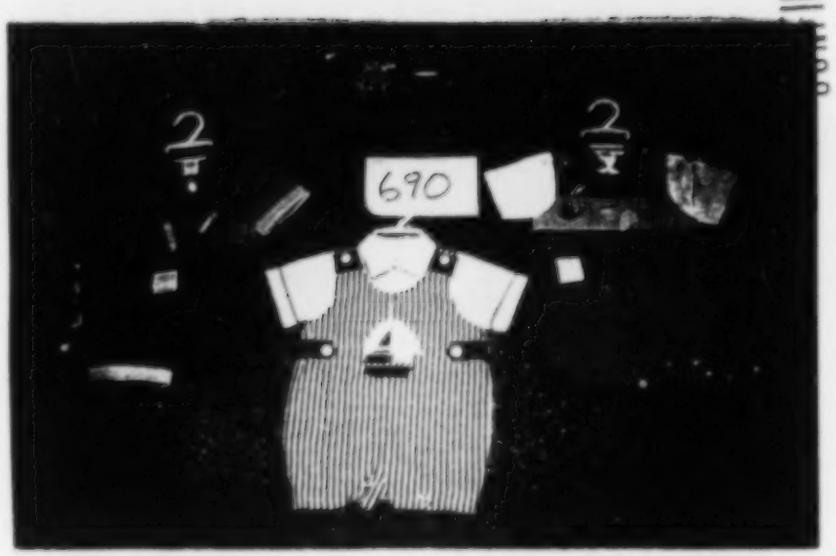


Plaintiff's Exhibit 12B

Plaintiff's Exhibit 13A

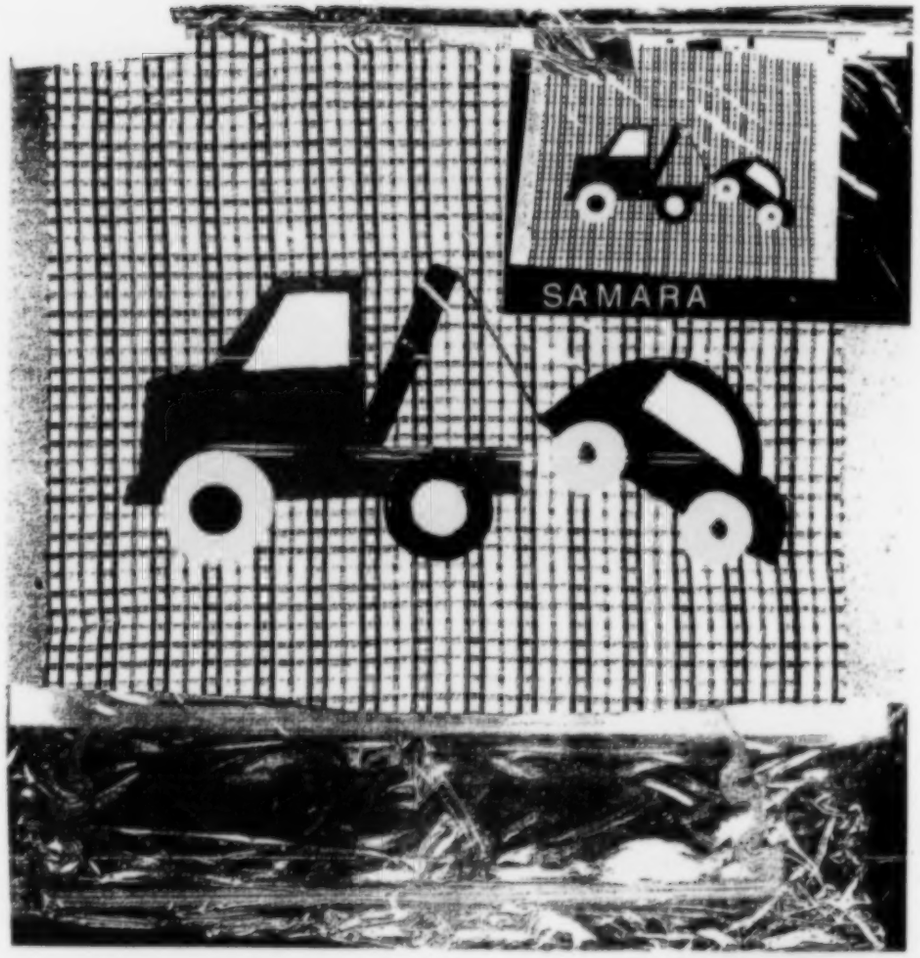
JA-178

Plaintiff's Exhibit 13B



CONFIDENTIAL 001256

Plaintiff's Exhibit 14A



JA-180

Plaintiff's Exhibit 14B

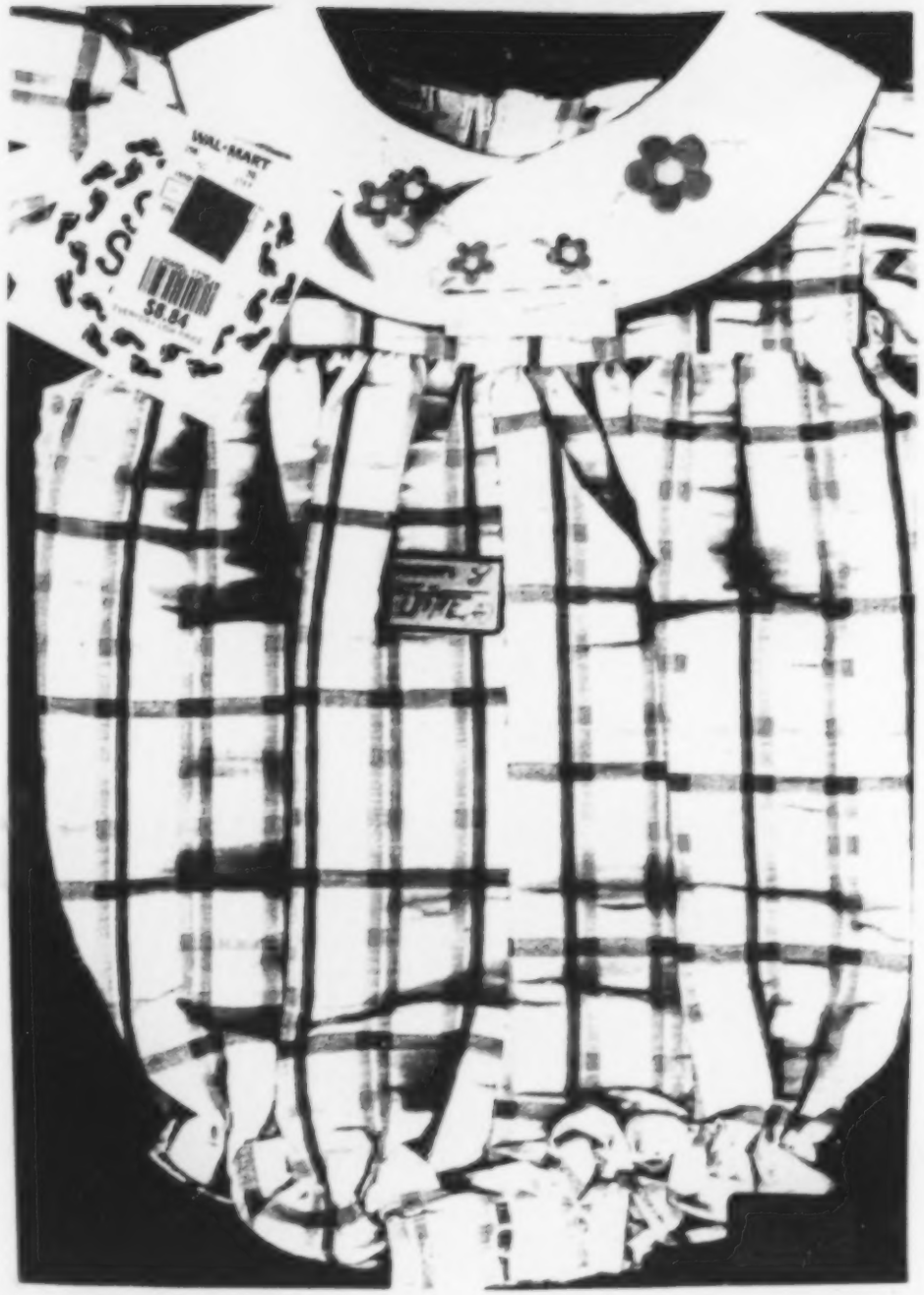
CONFIDENTIAL

001267

PLAINTIFF'S EXHIBIT 14B

Plaintiff's Exhibit 18

Plaintiff's Exhibit 19



Plaintiff's Exhibit 20

Plaintiff's Exhibit 24

Plaintiff's Exhibit 25

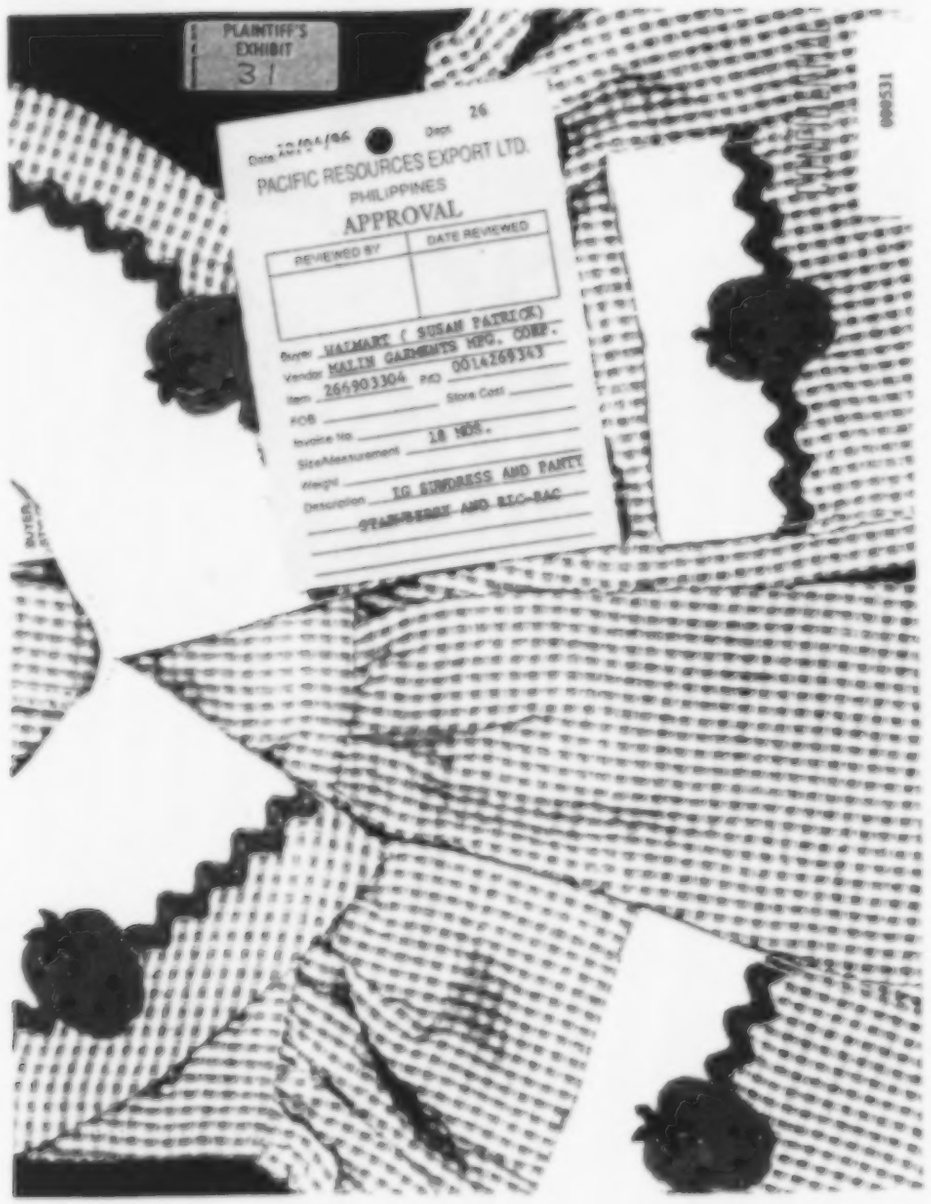
JA-186

Plaintiff's Exhibit 28

Plaintiff's Exhibit 29

JA-191

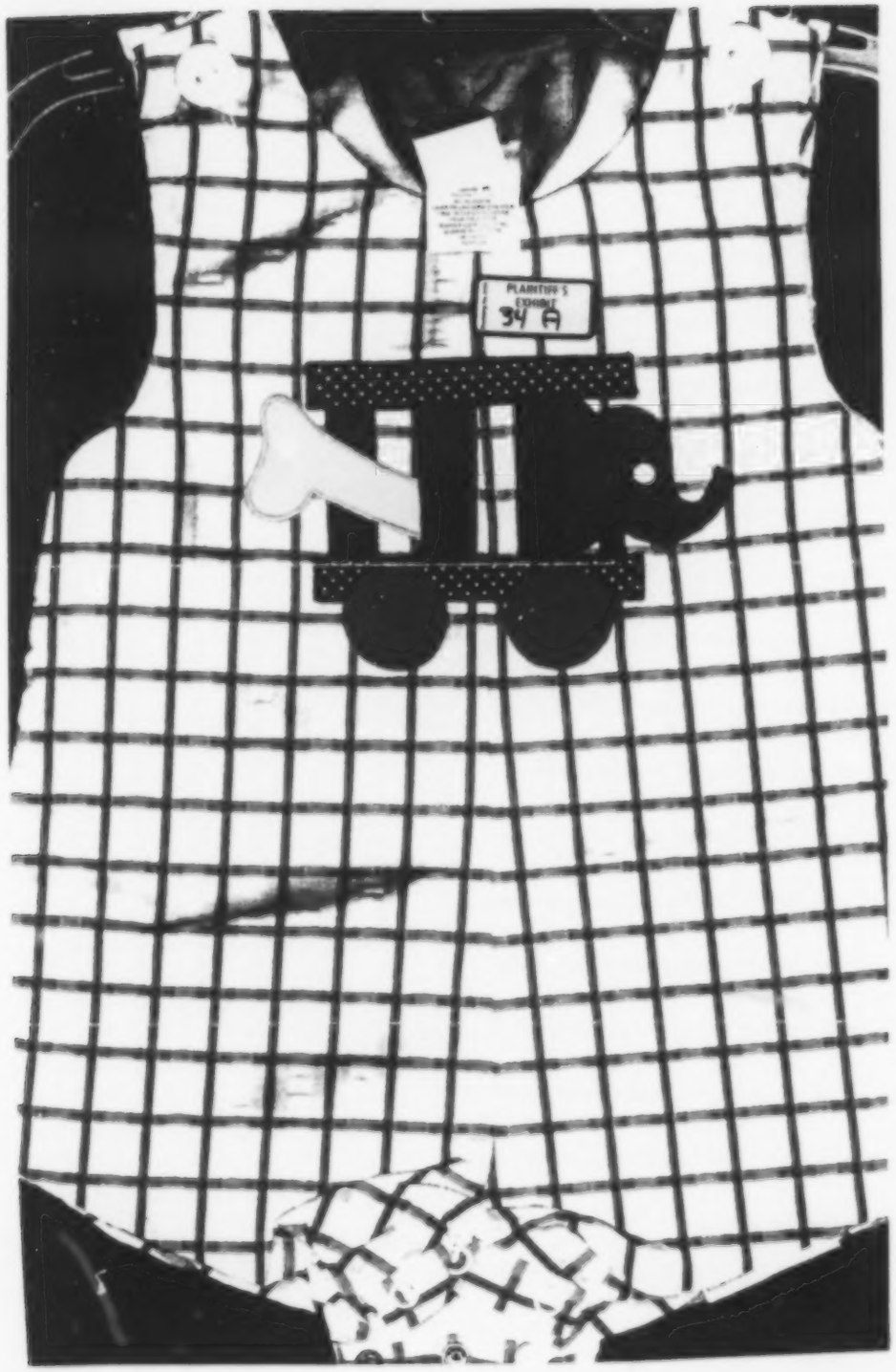
Plaintiff's Exhibit 31



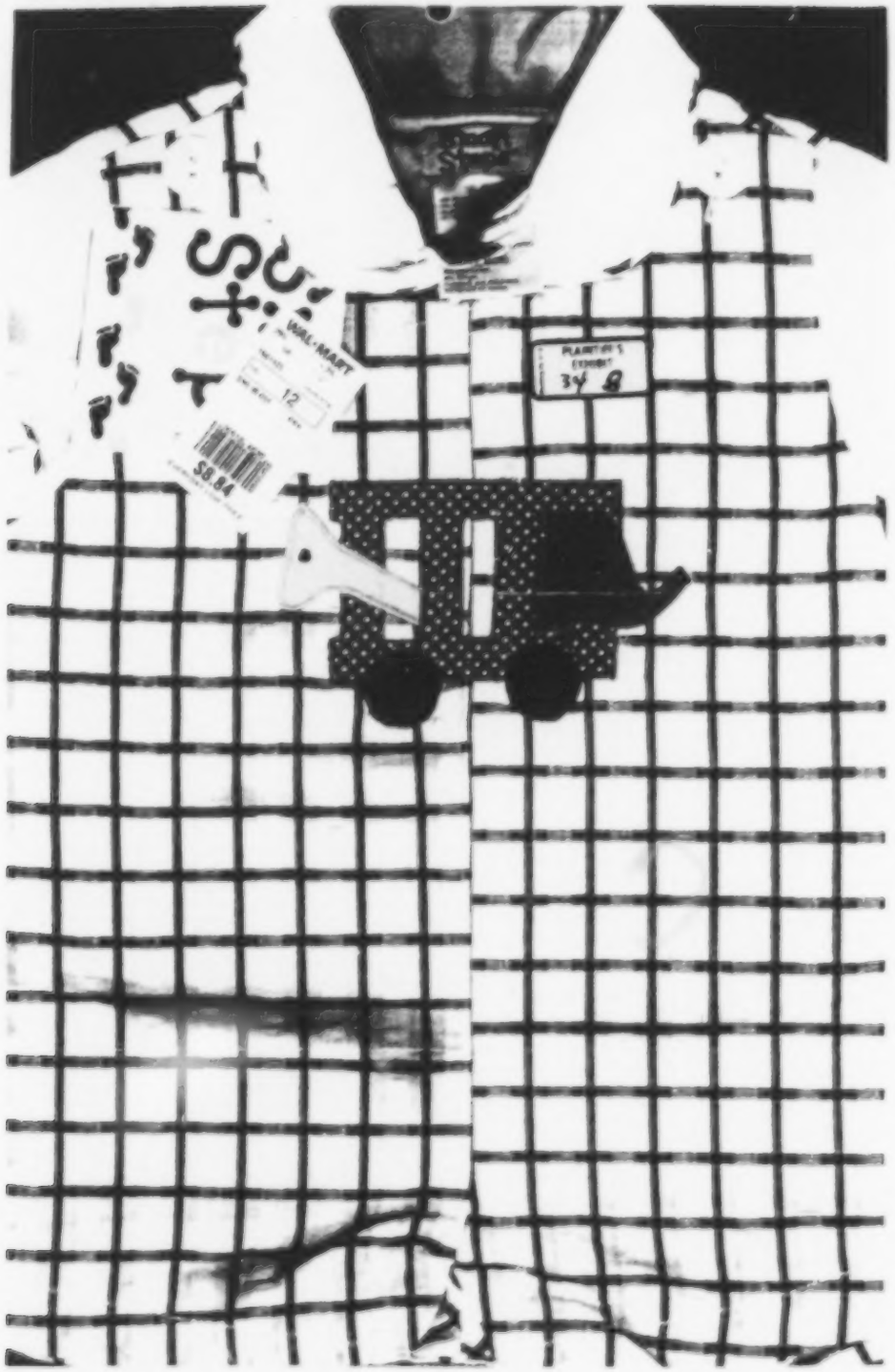
Plaintiff's Exhibit 32B

Plaintiff's Exhibit 33B

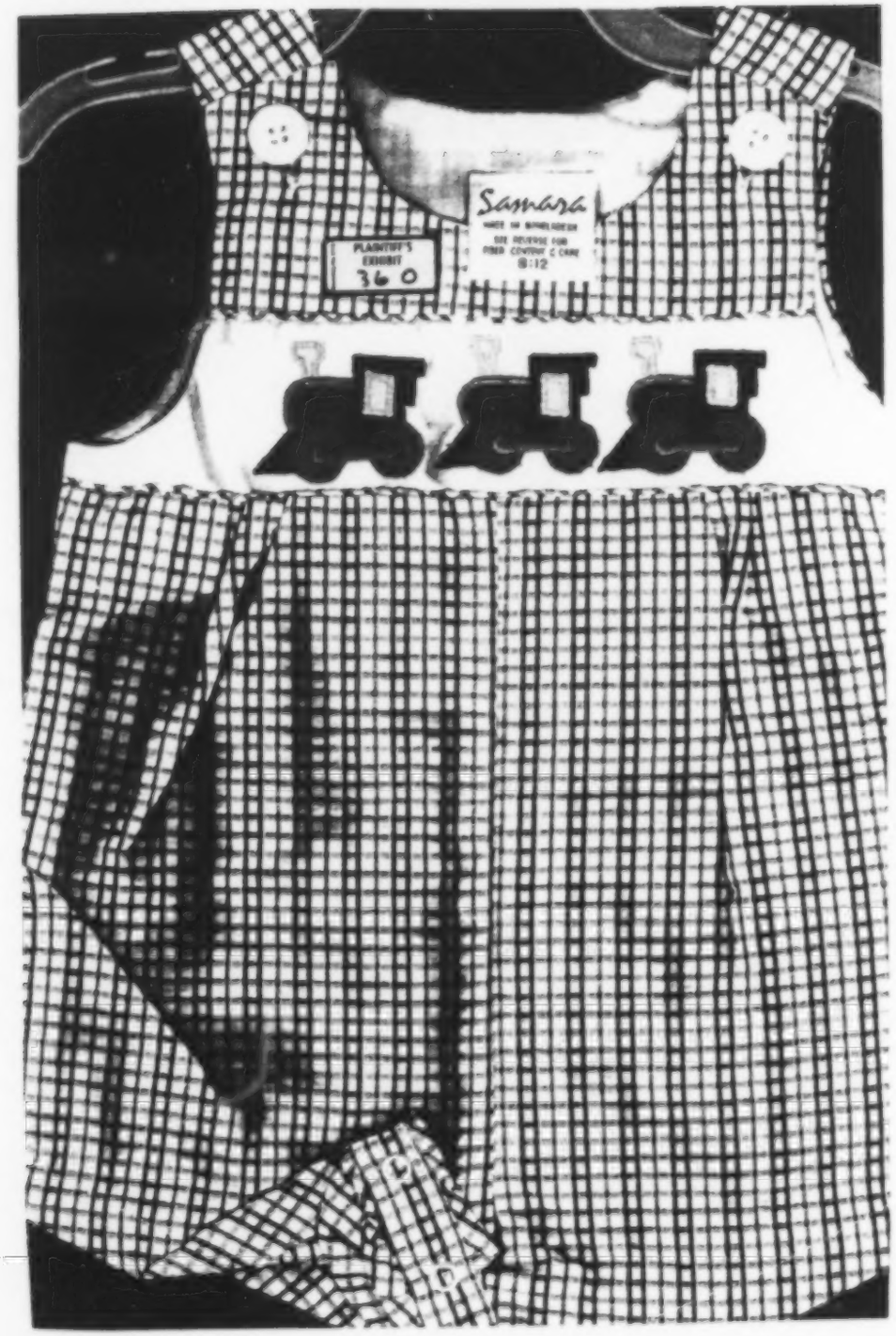
Plaintiff's Exhibit 34A



Plaintiff's Exhibit 34B



Plaintiff's Exhibit 36O



Plaintiff's Exhibit 38

baby & toddler stock-up sale
everything they need for fun-filled days of summer
badge denim jumpers 12.99
Ours exclusively for girls 2T-4T in 100% cotton. Reg. $18
ocean pacific 11.99
Shorts sets for boys 2T-4T in a variety of sporty prints. Reg. 16.99
novelty bodysuits 6.99
From Sweet Impressions. 100% cotton, for infants mos. Choose from assorted sayings. Reg. $10
25% off oshkosh
Colorful playwear for newborns and infants 3-24 mos., toddlers 2T-4T, boys 4-7, girls 4-6x. Denim, tees, shortsets, shorts and more. Reg. $12-$42 Sale $9-31.50
Sale prices in effect 5/21-6/8/96.
samara dresses 12.99
Partytime favorites in all-cotton brights & patterns. For newborns, infants & toddlers Reg. $18
first impressions basics 9.99
For newborns and infants 3-24 mos. Bodies, creepers, and sunsuits in textured steeds. Reg. $14
french creepers 4.99
From First Impressions. Pure cotton with matching booties. Adorable patterns for newborns and infants 0-24 mos. Reg. $7
Sorry, no phone orders accepted. Exclusive in Fedewood Dept. Stores. Selections vary by store. (1-411)(414)(41)562(1422)

Plaintiff's Exhibit 39

JA-200

Plaintiff's Exhibit 40

Plaintiff's Exhibit 46

Wal-Mart Style #	Samara Copyright	Portion of Style # Infring-ing	(From Ex. 35) Number of Units Sold	Purchase Price	Cost of Goods Sold (Col. 4 x Col. 5)	Total Sales (Ex. 35)	Gross Profits (Col. 7 - Col. 6)	Gross Profit on Infringe-ments (Col. 8 x Col. 3)
S961G453	VA 751-719	½	26,825	3.65	97,911.25	233,970.00	136,058.75	68,029.38
S961G458	VA 751-722	ALL	11,736	3.65	42,836.40	100,597.00	57,760.60	57,760.60
S961NG238	VA 751-720	ALL	23,110	3.65	84,351.50	197,242.00	112,890.50	112,890.50
S961NG239	VA 768-721	½	24,373	3.65	88,961.45	208,239.00	119,277.55	59,638.78
S961G457	VA 768-717	ALL	12,738	3.65	46,493.70	110,733.00	64,239.30	64,239.30

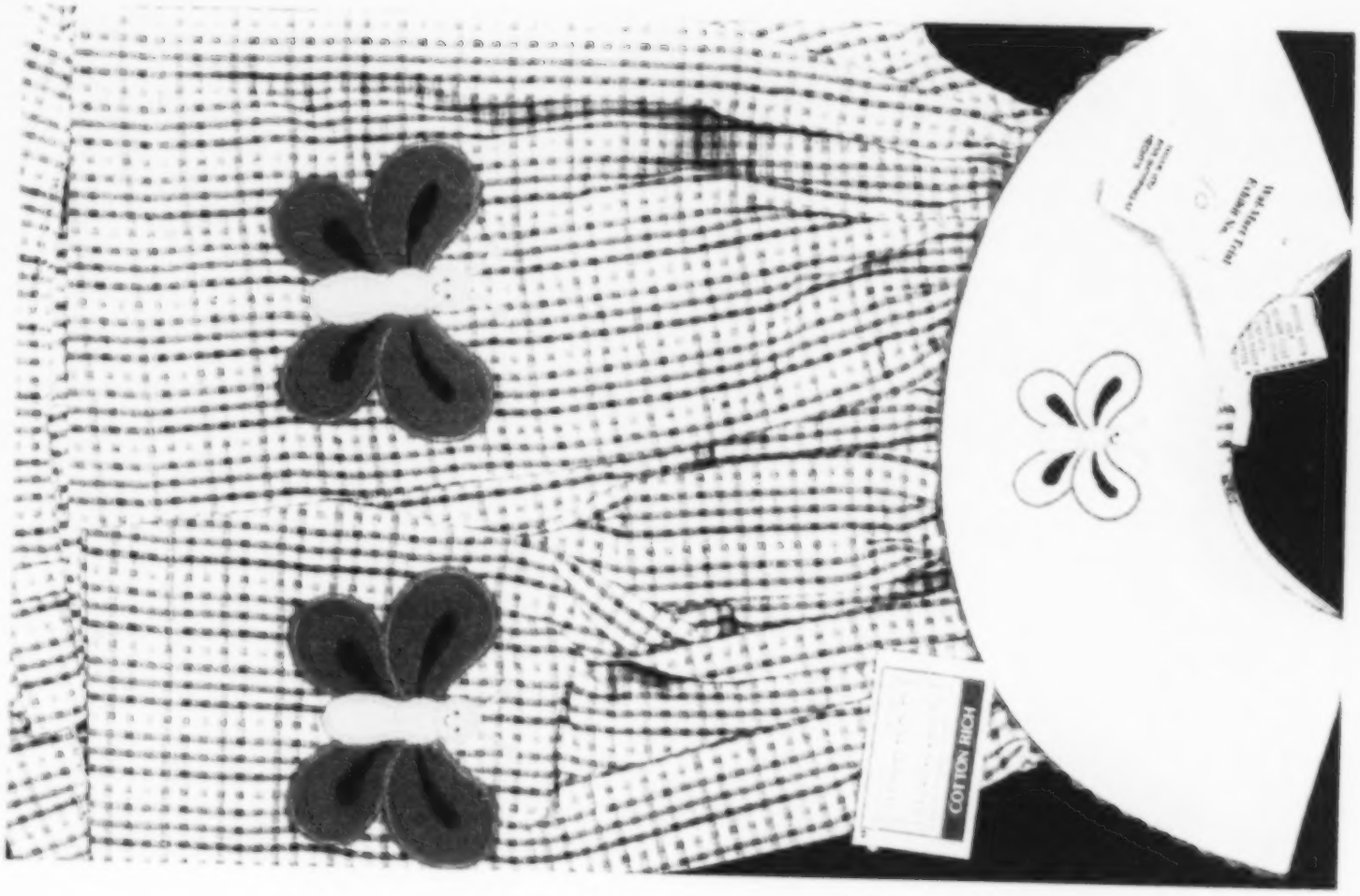
(continued on next page)

Wal-Mart Style #	Samara Copyright	Portion of Style # Infring-ing	(From Ex. 35) Number of Units Sold	Purchase Price	Cost of Goods Sold (Col. 4 x Col. 5)	Total Sales (Ex. 35)	Gross Profits (Col. 7 - Col. 6)	Gross Profit on Infringe-ments (Col. 8 x Col. 3)
S961NB600	VA 768-792 VA 769-793	ALL	25,212	3.65	92,023.80	210,169.00	118,145.20	118,145.20
S961B600	VA 768-793 VA 769-792	ALL	26,367	3.65	96,239.55	224,216.00	127,976.45	127,976.45
TOTAL SMALL STEPS GROSS PROFIT ON COPYRIGHT INFRINGEMENTS AS OF 7/13/96								**$608,680**

Wal-Mart Style #	Samara Copyright	Portion of Style # Infring-ing	(From Bates # 532-36) Number of Units Sold	Purchase Price	Cost of Goods Sold (Col. 4 x Col. 5)	Total Sales (From Bates # 532-36)	Gross Profits (Col. 7-Col.6	Gross Profit on Infringe-ments (Col. 8 x Col. 3)
690 B, 905 RB	VA 768-841	⅓	116,518	2.50	291,295	475,669	184,374	61,458.00
690A	VA 751-726	⅓	68,262	2.50	170,655	274,258	103,603	34,534.33
GROSS PROFIT ON COPYRIGHT INFRINGEMENT IN $3.88 PROGRAM								**$95,992.33**
TOTAL COPYRIGHT INFRINGEMENT GROSS PROFIT								**$912,856.77**

Wal-Mart Style #	Samara Copyright	Portion of Style # Infring-ing	(From Ex. 35) Number of Units Sold	Purchase Price	Cost of Goods Sold (Col. 4 x Col. 5)	Total Sales (Ex. 35)	Gross Profits (Col. 7 - Col. 6)	Gross Profit on Infringe-ments (Col. 8 x Col. 3)
S961G455		ALL	20,973	3.65	76,551.45	183,108	106,556.55	106,556,55
S961B621		½	27,823	3.65	101,553.95	238,821	137,267.05	68,633.53
S96NB601		½	26,894	3.65	98,63.10	228,700	130,536.90	65,268.45
GROSS PROFIT ON SMALL STEPS TRADE DRESS INFRINGEMENTS (NON ©)								**$240,458.53**
TOTAL GROSS PROFIT ON INFRINGING ITEMS								**$1,153,315.30**

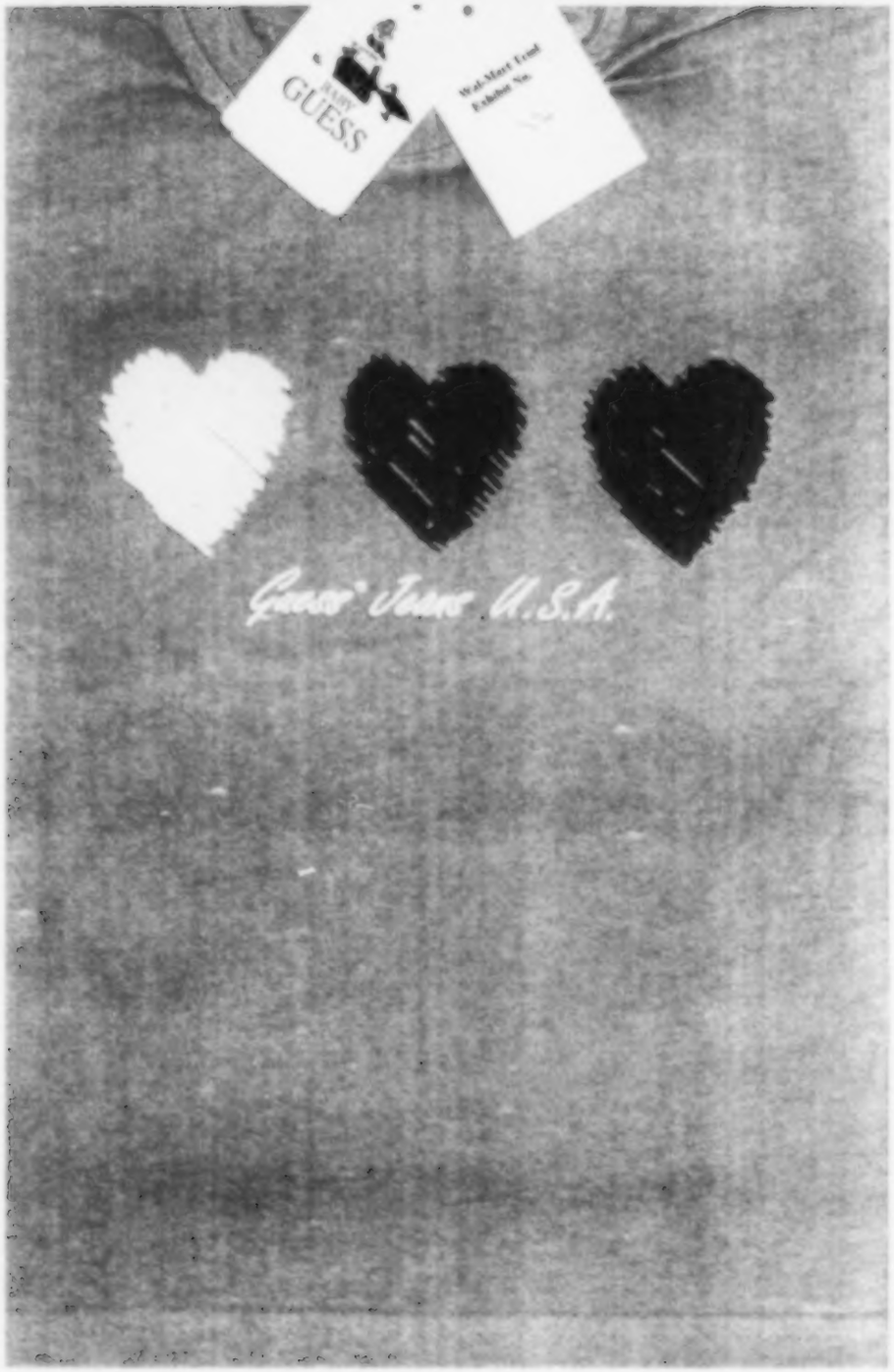
Wal-Mart Trial Exhibit No. 10



JA-206

Wal-Mart Trial Exhibit No. 11

Wal-Mart Trial Exhibit No. 12



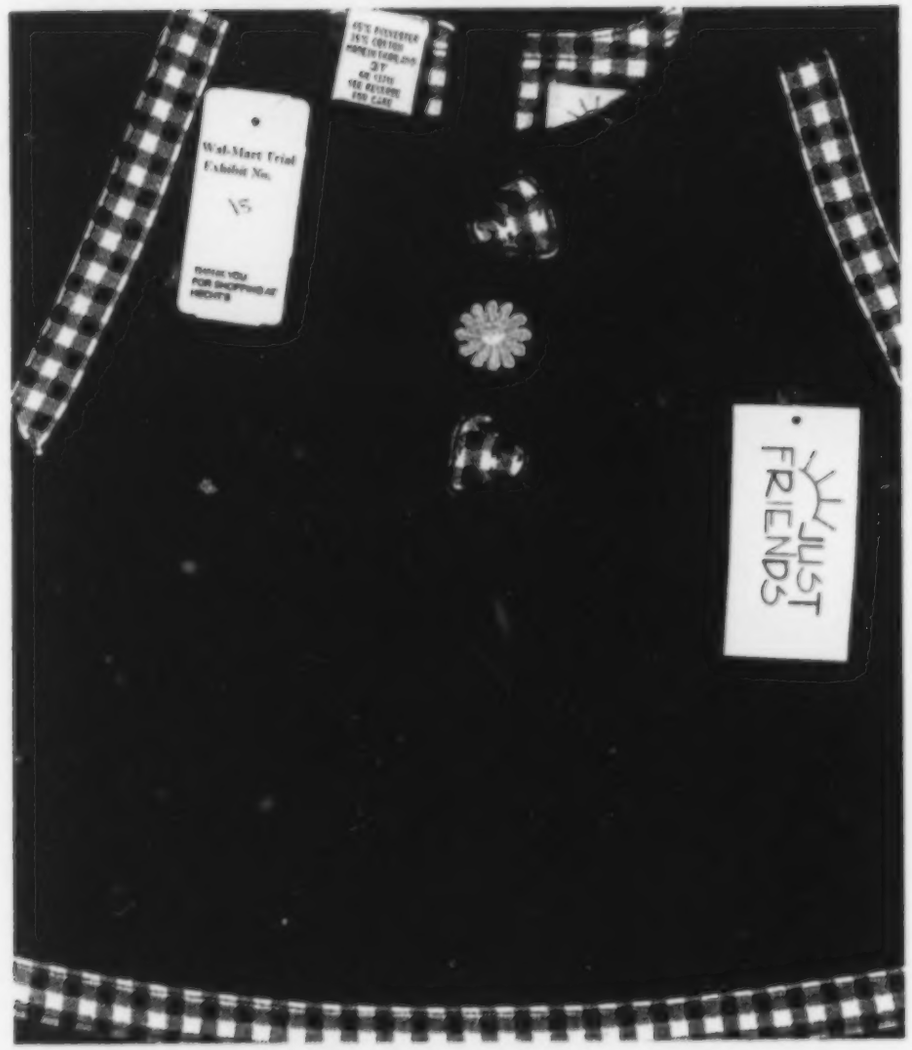
Wal-Mart Trial Exhibit No. 13

JA-209

Wal-Mart Trial Exhibit No. 14

JA-210

Wal-Mart Trial Exhibit No. 15

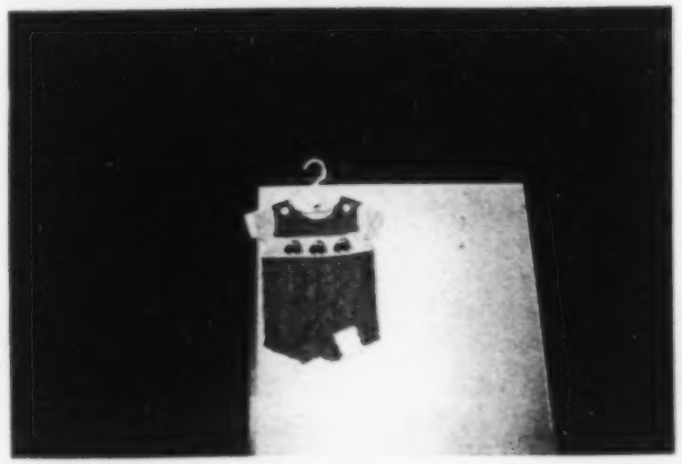


JA-211

Wal-Mart Trial Exhibit No. 16

Defendant's Exhibit 27

PLAINTIFF'S EXHIBIT 1 9/10/96



PLAINTIFF'S EXHIBIT 2 9/10/96

DEFENDANT'S EXHIBIT 27

PLAINTIFF'S
EXHIBIT 3
9/10/96

PLAINTIFF'S
EXHIBIT 4
9/10/96

PLAINTIFF'S
EXHIBIT 5
9/10/96

PLAINTIFF'S
EXHIBIT 6
9/10/96

PLAINTIFF'S
EXHIBIT 7
9/10/96

PLAINTIFF'S
EXHIBIT 8
9/10/96

PLAINTIFF'S
EXHIBIT 9
9/10/16

JA-217

Wal-Mart Trial Exhibit No. 47

Biobottoms

FRESH AIR WEAR FOR KIDS SUMMER 1995

Wal-Mart Trial
Exhibit No.

47

BIGBOTTOMS BABIES & TODDLERS
Animal Cracker Tees
The four-legged world as seen by an award-winning artist Mom. Our 6-oz. 100% cotton jersey makes kids feel cuddled. Fade-proof and full-cut, with ridge-free, double-stitched neck. Machine wash, dry. U.S.A.
3499 Animal Cracker Tees $16.00
Sizes: 12 mo., 18 mo., 2T, 3T, 4T
Patterns: Dog, Cat, Rhino
Piggy Bank Basics from Just $16.
Dog
Red/Royal Plaid
Cat
Yellow Plaid
Rhino
Royal/Black Plaid
Little Plaid Shorts
Pint-sized and cool. Our 100% cotton is yarn-dyed to lock in colors and gets softer every wash. Full cut, Bermuda length slides neatly over diapers. Machine wash, dry. U.S.A.
3500 Little Shorts $16.00
Sizes: 12 mo., 18 mo., 2T, 3T, 4T
Colors: Red/Royal, Yellow, Royal/Black
Appliqued Shortall Sets
Fantastic value in 100% cotton. Color-loving, play-tough twill is brushed to downy softness. Reinforced seams, double-stitched hems. Buttons on straps and sides. Snaps at inseam in infant sizes for whirlwind dressing. 100% cotton jersey tee has button shoulders in infant sizes. Machine wash, dry. Imported.
3577 Appliqued Shortall Set $28.00
Sizes: 12 mo., 18 mo., 2T, 3T, 4T (L)
Patterns: Red Plane, Blue Train

Get Big Picture Sara's at Our Smallest Price. Just $19.50

Sara's Prints Short Johns for Girls
Ruffled at every edge and bowed at the neck. With a floaty top for summer comfort. Soft every inch in Sara's long staple 100% Egyptian cotton. Machine wash, dry. Imported.

Green Velvet

3528 Girls' Sara's Short Johns $19.50
Sizes: 4, 5, 6, 10, 12, 14
Patterns: Mini Floral, Flower Power, Splashy Flower Melon

Sara's Prints Short Johns
A big range of sizes lets you gather premium cottons for every child. Big picture tops and boxers keep things sleek, simple and cool. All are Sara's silky-soft, 100% long staple cotton. Machine wash, dry. For longer wear, we recommend ordering one size up. Imported.

Green Velvet

3555 Sara's Print Short Johns $19.50
Sizes: 2, 3, 4, 5, 6, 7, 8, 10, 12, 14 (S)
Patterns: Rally, Football, Dino, Western, Summertime, Fish

SLEEPTIME COMFY STUFF
Sara's Uncrossed Long Johns
Like slipping into cool smooth sheets, Sara's fine-knit cotton is so soft and soothing it helps kids doze years. Wonderful to cuddle in after a day of hard play. The long staple cotton is lightweight, baby-soft and famously sturdy. Finished for smoothness, inside and out. Machine wash, dry. For longer wear, we recommend ordering two sizes up. Imported.
3456 Little Kid Sara's Johns
Sizes: 4, 5, 6, 7 $28.00 (S)
3456 Big Kid Sara's Johns
Sizes: 8, 10, 12, $30.00 (S)
Sizes: 14, 16 $34.00 (S)
Patterns: Astros, Fish with Attitude, Dinos, Ballerinas, Sports Stamps, Lily Pad Prince, River Rafting, Football, Western, Rally, Baseball Cards, Sports
SARA'S PRINTS
Cotton Keeps Its Cool with Sara's.™

Razzle-Dazzle Tanks
Unabashedly embellished with stitching, gold and silla rhinestone sparkles. But they're serious about fit and durability in our 80% nylon, 20% Lycra blend. Hand wash, line dry. Unlined.
3380 Razzle-Dazzle Tanks $28.00
Sizes: 2T, 3T, 4T, 4, 5, 6, 6X
Patterns: Pink Fish, Turquoise Flowers

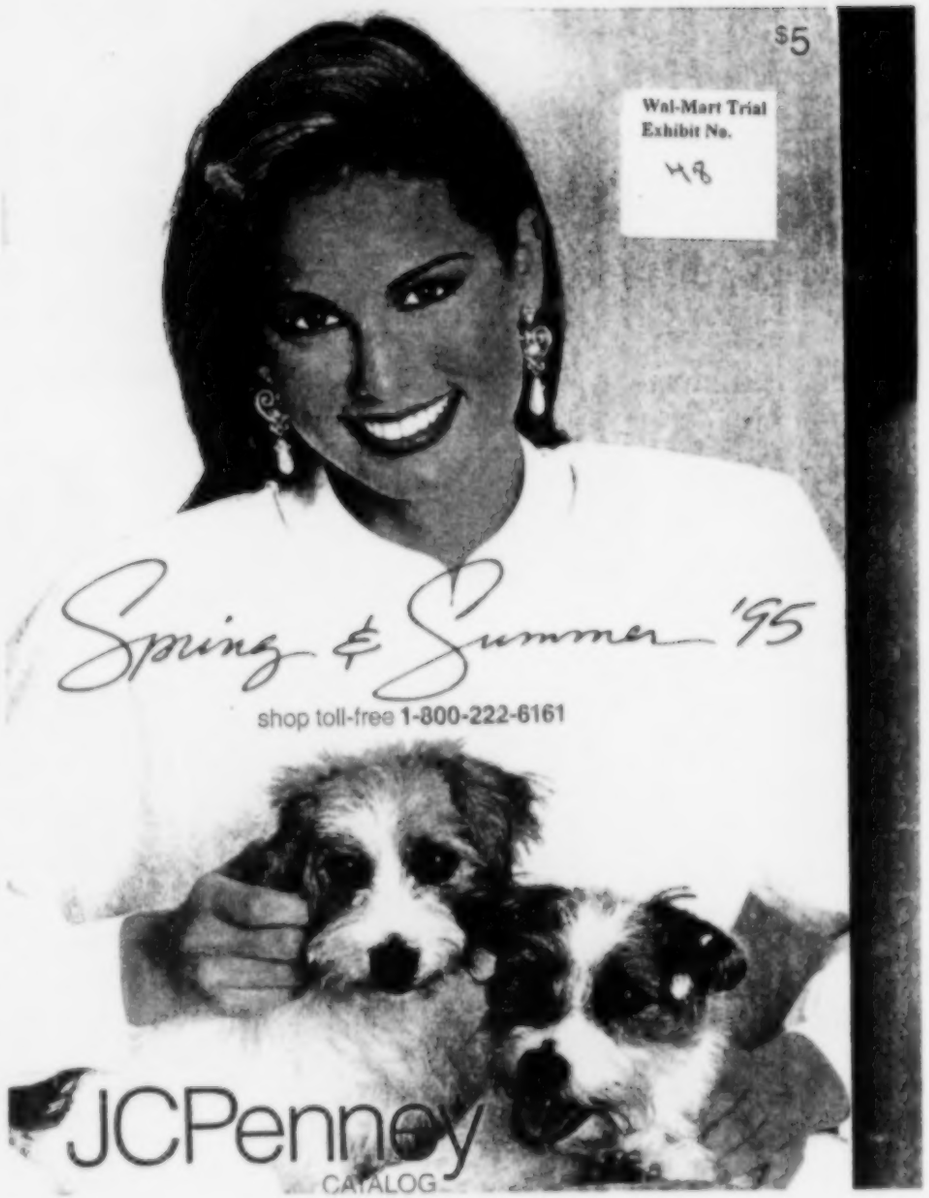
Speedo® Stars and Stripes Tanks
By the maker for the Olympics. Racer back frees girls for serious action. Lined front panel for long life. 85% nylon, 15% Lycra. U.S.A.
1617 Stars and Stripes Tanks
Limited Time!
Sizes: 4, 5, 6, 6X $23.00
Sizes: 7, 8, 10, 12, 14, 16 $25.00

Maidenform Waves Suits
The fast-drying, color-holding 64% nylon, 16% spandex can twist and wriggle with the silliest maneuvers. The contrast ruffles are perfect for a little girl's shape. Straps are made to stay put. U.S.A.
3575 Maidenform Waves Suits $28.00
Sizes: 2T, 3T, 4T, 5, 6, 6X, 7, 8
Patterns: Frost, Date

BIGBOTTOMS GIRLS
3383 Girls' 88 Print
Leggings $16.00
Sizes: 4/5, 6/6X, 7/8, 10/12, 14
3386 Adults' 88 Print
Leggings $20.00
Sizes: XS, S, M, L
3395 Matching Headbands $4.00
Patterns:
Natural Floral,
Hearts, Blue Dot,
Pink Dot,
Butterflies, Cats,
White Floral,
Black Floral
Look Ma Sleeves
Trapeze Tee 88
Cool and universally
becoming. The hooshed,
rib collar even works for
casual dress-up. Over 10 oz.
100% cotton jersey has the
substance for swinging
Cover stitched hems. Inset
Garments dyed, preshrunk
Machine wash, dry. U.S.A.
3394 Trapeze Tee $18.00
Sizes: 2/3, 4/5, 6/6X
7/8, 10/12, 14
Colors: Fuchsia, Hearts,
Royal, White, Yellow,
Red, Purple, Jade
n Town
CATS
WHITE FLORAL
BUTTERFLIES
Fun Feet
Many Shapes
Featuring two star-bed rows
Curving midsoles in contrast
to the long-lined sole and
sterling toe cap. 100%
rubber uppers. Fits true to
shoe sizes. U.S.A.
1808 Crayon Many
Sizes: 8 9 10 11
12 13 1 2 3
Colors: Pink, Navy, White

JA-223

Wal-Mart Trial Exhibit No. 48



newborn-12m

A One-piece cotton gingham shortalls with clip-on bow tie and socks. Appliqued polyester and cotton shirt and nylon socks. Gripper snaps. Back zipper. Made in U.S.A. of imported fabric. (0.70 lb.)
Infants: 0-3 months, 6-9 months, 12 months.
A 380-0516 B 28.00

B Cotton gingham dress with socks. Appliqued polyester and cotton collar and nylon socks. Back zipper. Made in U.S.A. of imported fabric. (0.70 lb.)
Infants: 0-3 months, 6-9 months, 12 months.
A 380-0694 B 32.00

C Alligen Ann® fluffy dress with button back closure. Polyester. Made in U.S.A. (0.70 lb.)
Infants: 0-3 months, 6-9 months.
A 380-0672 B 25.00

D One-piece vested knickers. Cotton front mock vest over polyester and cotton shirt. Zipper back. Polyester and rayon clip-on bow tie and knickers with gripper snaps. Made in U.S.A. (0.70 lb.)
Infants: 0-3 months, 6-9 months.
A 380-0680 B 28.00

E Coveralls with embroidered cardigan. Cotton chambray coveralls with elasticized top. Gripper snaps. Top and cardigan are polyester and cotton. Imported of domestic fabric. (0.50 lb.)
Infants: 0-3 months, 6-9 months.
A 380-0632 B ..... Set 24.00

F Dress and bloomers. Dress has button back closure. Bloomers have elastic waist and legs. Polyester and cotton. Made in U.S.A. (0.50 lb.)
Infants: 0-3 months, 6-9 months.
A 380-0640 B ..... Set 30.00

G Cotton bubble with nylon socks. Button back, gripper snaps. Imported of domestic fabric. (0.70 lb.)
Infants: 0-3 months, 6-9 months.
A 380-0687 B 18.00

H Honette® embroidered romper with booties. Button back and gripper shoes. Bloomer button closure. Polyester and cotton. Imported. (0.50 lb.)
Infants: 0-3 months, 6-9 months.
A 380-0665 B 21.00

J Adjustable buckle strap shoes. Leather with urethane top coat. Unit-molded rubber sole. Made in U.S.A. (0.40 lb.)
Infants: whole 2-7. Half sizes, order next larger whole size.
A 495-0721 D 16.00

K Delsin® musical caterpillar. Pull tail for 3 minutes of "Twinkle, Twinkle Little Star." About 11x7x4½" unstandard. Vinnel plush with polyester fill. Washable surface. Toy is imported from Thailand with Japanese musical part. Ages 0 and up. (0.50 lb.)
A 339-0368 A 25.00

All apparel items on this page are machine wash, tumble dry.

L&M Little Arizona cotton chambray coveralls. Button fronts with appliqué and pockets. Gripper snap legs. Imported. (0.55 lb.)
Infants: 0-3 months, 6-9 months.

L Knit collar coveralls with front elastic insets.
A 389-0498 B 18.00

M Coveralls.
A 389-0488 B 18.00

N Okie-Dokie overall set with pullover top. Overalls have adjustable button closure, side buttons, pockets and gripper snap legs. Cotton, imported. (0.70 lb.)
Infants: 0-3 months, 6-9 months.
A 389-0482 B ..... Set 18.00

O Okie-Dokie striped overall set with ruffle front knit top. Overalls have adjustable button straps, side buttons, pockets and gripper snap legs. Cotton, imported. (0.70 lb.)
Infants: 0-3 months, 6-9 months.
A 389-0474 B ..... Set 18.00

P Little Me® hooded creeper with appliqué. Button front and gripper snap legs. Cotton, imported of domestic fabric. (0.30 lb.)
Infants: 0-3 months, 6-9 months.
A 389-0468 B 21.00

Q Little Me floral creeper with attached front top and embroidered chambray vest. Back snap closure. Elasticized leg openings with gripper snaps. Cotton, imported of domestic fabric. (0.60 lb.)
Infants: 0-3 months, 6-9 months.
A 389-0588 B 24.00

R Cotton twill diaper bag with screened peach and large back pocket. Straps snap once smaller. Zipper top closes. Fully lined vinyl interior with four elastic bottle holders, separate changing pad and storage pouch for wet items. About 21x13x8". Wipe clean with wet cloth. Imported. (2.20 lbs.)
A 342-2314 A 26.00

S Nike® "Baby Swoosh" crib shoe. Fly-cast leather upper with adjustable VELCRO® Brand self-adhesive closure. Cotton lining. Synthetic rubber-blend sole. Imported from Thailand. (0.70 lb.) Color: 79 white.
Infants: whole 1-4, half sizes, order next larger whole size.
A 498-2388 O 30.00

All apparel items on this page are machine wash, tumble dry.

newborn-9m

A
C
B
D
E

A Michael Jordan® Stars suit. Clip-on tank top, short sleeve shirt, jacket, shorts with button suspenders, and nylon socks. Blue jacket has patch, white jacket + piping. Shorts have basketball mesh. Polyester and cotton shirts and plaid shorts. Jackets and solid shorts are polyester and rayon. Made in U.S.A. (0.75 lb.)
Toddlers: 2T, 3T, 4T.
A 350-0779 O ..... Set 38.00

B Hush Puppies® pigskin oxford. Urethane with synthetic lining. Flexible compression rubber sole sole. Imported from China. (1 lb.)
Infants/Toddlers: whole, half 5-6.
A 450-0088 O 20.00

C Package of 6 pairs of knee socks, in white nylon. Made in U.S.A. (0.40 lb.)
Infants/Toddlers: Infants shoe size 4-7), L(7-11) s. Sizes M or L.
A 344-0377 O ..... 6 pairs in Pkg. 9.00

D Allison Anne® floral dress with hat, infant sizes come with bonnet, toddler with sister hat. Button back. Cotton dress with polyester and cotton collar. Made in U.S.A., straw hat is imported. (1 lb.) Color: 88 pink.
Infants/Toddlers: 0-6 mos., 12 mos., 18 mos., 2T, 3T, 4T
A 349-0863 O 22.00

E Vaudini® toddlers 4-piece set. Sweatsuit includes ; nylon adjustable elastic clip-on suspenders and back elastic waist. Detachable tie. Polyester and cotton. Made in U.S.A. (0.70 lb.) Color: 88 blue stripe.
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 325-0792 O ..... Set 28.00

F Plush 22" bunny. Save when you purchase with any $20 or more apparel item from our Children's pages 510-597. Acrylic plush with polyester fill. Surface washable. Imported. Ages 3 years and up. (4 lbs.)
A 369-0491 A ..... If purchased separately, 25.00
When purchased with $20 item, 12.50

G Jo Lena® dress with bloomers. Button back dress. Elasticized waist bloomers. Polyester and cotton. Made in U.S.A. (1.39 lbs.) Color: 88 pink print.
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 348-0948 O ..... Set 26.00

H Michael James suspender short set. Appliqué at shirt placket and on nylon socks. Shorts have self-fabric button suspenders and elasticized backwaist. Polyester and cotton. Made in U.S.A. (0.70 lb.) Color: 55 black.
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 305-0798 O ..... Set 22.00

J Allison Ann lace dress with rosette trim and empire waist. Button back. Polyester lace with polyester taffeta lining. Made in U.S.A. (1.00 lb.) Color: 13 ecru.
Toddlers: 2T, 3T, 4T.
A 348-0870 O 30.00

All apparel items on this page are machine wash, tumble dry.

6m-4t

K *Jo-Lena® dress.* Gutter-stitch. Polyester and rayon. Made in U.S.A. (1 lb.) Color: 31 pink.
Infants/Toddlers: 6-9 mos., 12 mos., 18 mos., 2T, 3T, 4T.
A 348-0966 O 28.00

L *Allison Ann® crinoline dress.* Sheer dropped polyester and nylon collar can tie bad in back. Princess seams and front dip smocking. Sash bodice. Cotton. Made in U.S.A. (1 lb.) Color: 09 floral.
Toddlers: 2T, 3T, 4T.
A 348-0969 O 30.00

M *Michael James® vested sheath set.* Clip-on cotton bow tie. Solid back vest with elastic insert. Elastic waistband in elastic. Polyester and cotton shirt. Polyester and rayon vest and shorts. Acetate-rear back and lining. Made in U.S.A. (0.70 lb.)
Toddlers: 2T, 3T, 4T.
A 388-0794 S ..... Set 36.00

N *Jo Lena* print fluffy dress with lace and bow trim. Cotton. Made in U.S.A. (1 lb.) Color: 09 print.
Infants/Toddlers: 6-9 mos., 12 mos., 18 mos., 2T, 3T, 4T.
A 348-0968 O 28.00

O Package of 4 pairs of tots socks. Includes: one pair in white, and one each of pink and lilac. Stretch nylon. Made in U.S.A. (0.20 lb.)
Infants/Toddlers: Fits shoe sizes 5-8), L(6-7). Sizes M or L.
A 344-0898 B ..... 4 pairs in Pkg. 9.99

P *Allison Ann chiffon dress* with bow trim. White cross hair lace bodice. Wire hems and tiered lace overskirt. Polyester with polyester lining/linings. Dry clean. Made in U.S.A. (1 lb.)
Toddlers: 2T, 3T, 4T.
A 348-0970 O 30.00

Q Four-piece linen suit. Double-breasted jacket with acetate lining. Pleated pants with elasticized backwaist. Jacket and pants are polyester and rayon, dry clean. Polyester and cotton, short sleeve shirt is machine wash, tumble dry. Polyester clip-on tie. Made in U.S.A. (0.60 lb.) Color: 02 natural.
Toddlers: 2T, 3T, 4T.
A 388-0960 O ..... Set 48.00

R *Allison Ann shoe* with elastic-covered self-adhesive strap for a comfortable fit. Urethane upper with cushioned insole. Composition rubber unit sole. Imported from China. (0.70 lb.)
Infants/Toddlers: whole, half 5-10.
A 406-0127 O 15.00

S Package of 6 pairs of tights from Allison Ann, includes one each: white heart lace, pink heart lace, white rochelle lace, pink, ecru and white. Nylon, hand wash, line dry. Made in U.S.A. (0.20 lb.) Package: 01 assortment.
Infants/Toddlers: 0(0-6 mos.), M(9-18 mos.), L(1-3T). Sizes S, M or L.
A 344-0878 O ..... 6 pairs in Pkg. 11.00

All apparel items on this page, unless otherwise stated, are machine wash, tumble dry.

No room o ffer! See pages 644, 645.

12m-4t
infants, toddlers

A Swing top and short set. Screen-printed top with button front. Shorts have elasticized waist and legs. Polyester and cotton knit. Made in U.S.A. (1.20 lbs.)
Color: 17 yellow.
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 349-1238 O ..... Set 15.00

B Jordache® cotton chambray coveralls with eyelet trim, button front and gripper snap legs. Imported. (1.20 lbs.)
Color: 35 blue.
Infants: 12 mos., 18 mos., 24 mos.
A 349-1347 O 18.00

C Package of 2 creepers from Otto-Dolce®. Snap closure. Legs are elasticized with gripper snaps. Cotton and polyester. Imported. (0.70 lb.)
To order, state: 99 Package A.
Infants: 12 mos., 18 mos., 24 mos.
A 349-1073 O ..... 2 in Pkg. 15.00

D Otto-Dolce pant set with headband. Pullover top with sailor collar. Elasticized waist pants. Cotton and polyester. Imported. (1.70 lbs.)
Infants: 12 mos., 18 mos., 24 mos.
A 349-1099 9 ..... Set 12.00

E Hannette® appliqued bubble with hat. Button back, gripper snap legs. Polyester and cotton. Imported. (1.20 lbs.)
Color: 76 white print.
Infants/Toddlers: 12 mos., 18 mos., 24 mos., 2T, 3T, 4T.
A 349-1339 O 22.00

F Package of 2 short sets from Otto-Dolce. Screen-printed tops. Shorts have elasticized waists. Cotton and polyester. Imported. (1.70 lbs.)
To order, state: 99 Package A.
Infants: 12 mos., 18 mos., 24 mos.
A 349-1081 O ..... 2 in Pkg. 14.00

G Toddletime® leather oxfords with pebbled collar. Cushioned insole with arch support. Flexible vinyl rubber sole. Imported from China. (1 lb.)
Infants/Toddlers: whole, half 4-7
A 486-0805 O 19.99

All apparel items on this page are machine wash, tumble dry.

H Ollie-Ostrich® legging set. Pull-on top. Elasticized waist leggings. Polyester and cotton. Made in U.S.A. (0.70 lb.)
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 349-1399 B ..... Set 15.00

J Chambray short set. Screen printed top. Elasticized waist and legs in shorts. Polyester and cotton top. Sleeves, ruffle and shorts are cotton. Made in U.S.A. (0.50 lb.)
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 349-1479 B ..... Set 15.00

K Short set with matching backpack. Polyester and cotton T-shirt with screen print. Cotton shorts have elasticized waist. Backpack is cotton and has drawstring top. Appliqué area about 12x8½" imported of assorted fabrics. (0.75 lb.)
Color: 35 blue.
Toddlers: 2T, 3T, 4T.
A 349-1439 B ..... Set 15.00

L Appliquéd bodysuit and short set. Bodysuit with snap bottom. Shorts have elasticized waist and legs. Polyester and cotton. Made in U.S.A. (0.70 lb.)
Infants/Toddlers: 12 mos., 18 mos., 2T, 3T, 4T.
A 349-1388 B ..... Set 20.00

M Allison Anne® fleece-constructed bodysuit with sequin collar. Button back with cash. Gripper snap legs. Cotton and polyester. Imported. (0.70 lb.)
To order, state: 99 Package A.
Infants/Toddlers: 12 mos., 18 mos., 24 mos., 2T, 4T.
A 349-1481 D 22.00

N Package of 2 Ollie-Dollie short sets. Screen-printed tops. Shorts have elasticized waists. Polyester and cotton. Made in U.S.A. (1.70 lbs.)
To order, state: 99 Package A.
Toddlers: 2T, 3T, 4T.
A 349-1404 D ..... 2 in Pkg. 16.00

O Package of 12 pairs of Teddietime® socks in assorted colors, some with appliqués. Cotton and nylon. Made in U.S.A. (0.20 lb.)
Infants/Toddlers: Sofflo shoe sizes 1-4, 5(4-7), 6(7-11½). Size S, M or L.
A 344-3888 B ..... 12 pairs in Pkg. 12.00

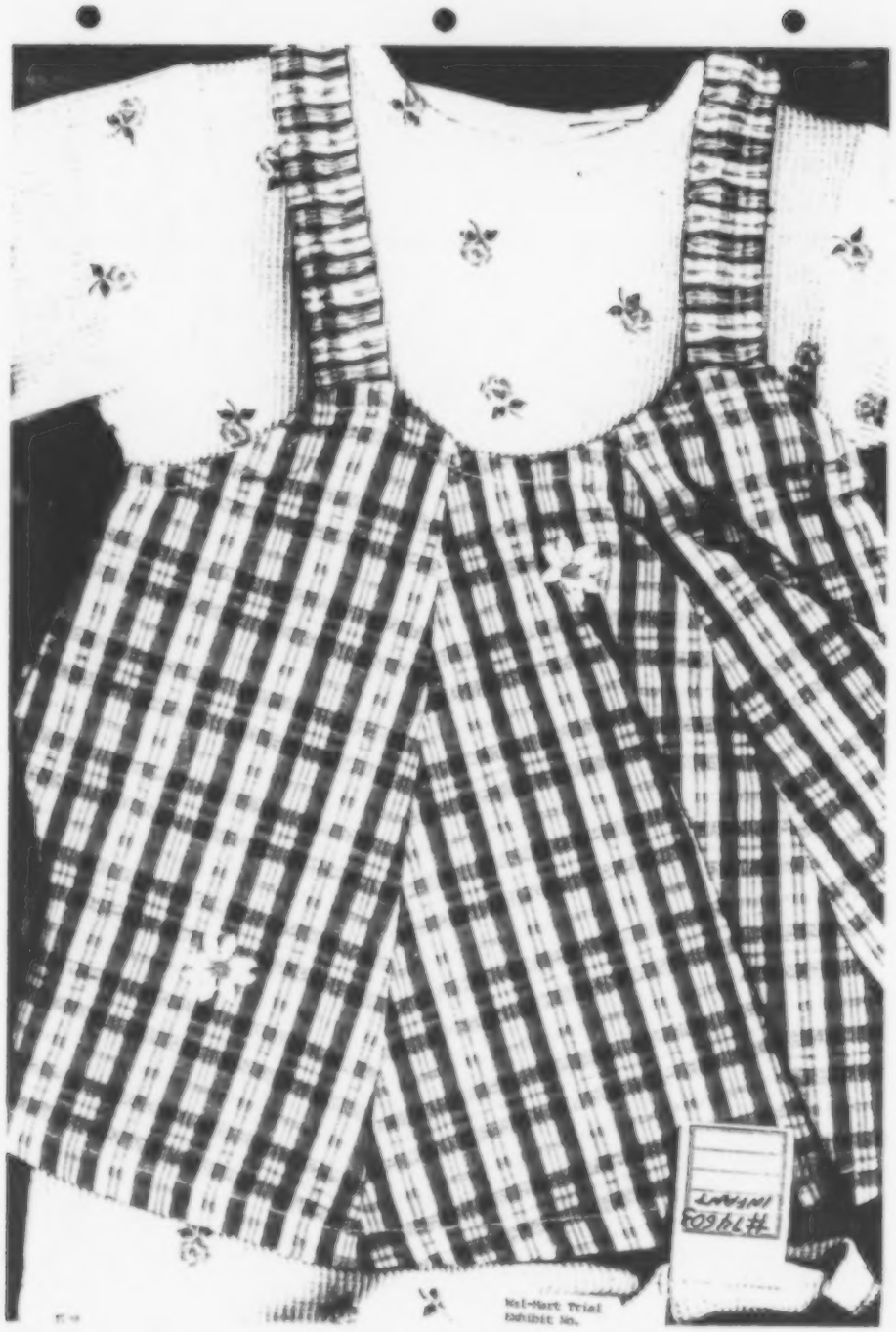
P Ollie-Dollie cotton canvas oxford in solid colors or white with embroidered trim. Cushioned insole and arch support. Rubber sole and toe guard. Imported from China. (0.75 lb.)
Infants/Toddlers: whole, half 5-9.
A 682-6807 O—Solids
A 710-0191 O—Embroidered 8.99

All apparel items on this page are machine wash, tumble dry.

Be sure it fits! See pages 544, 548.

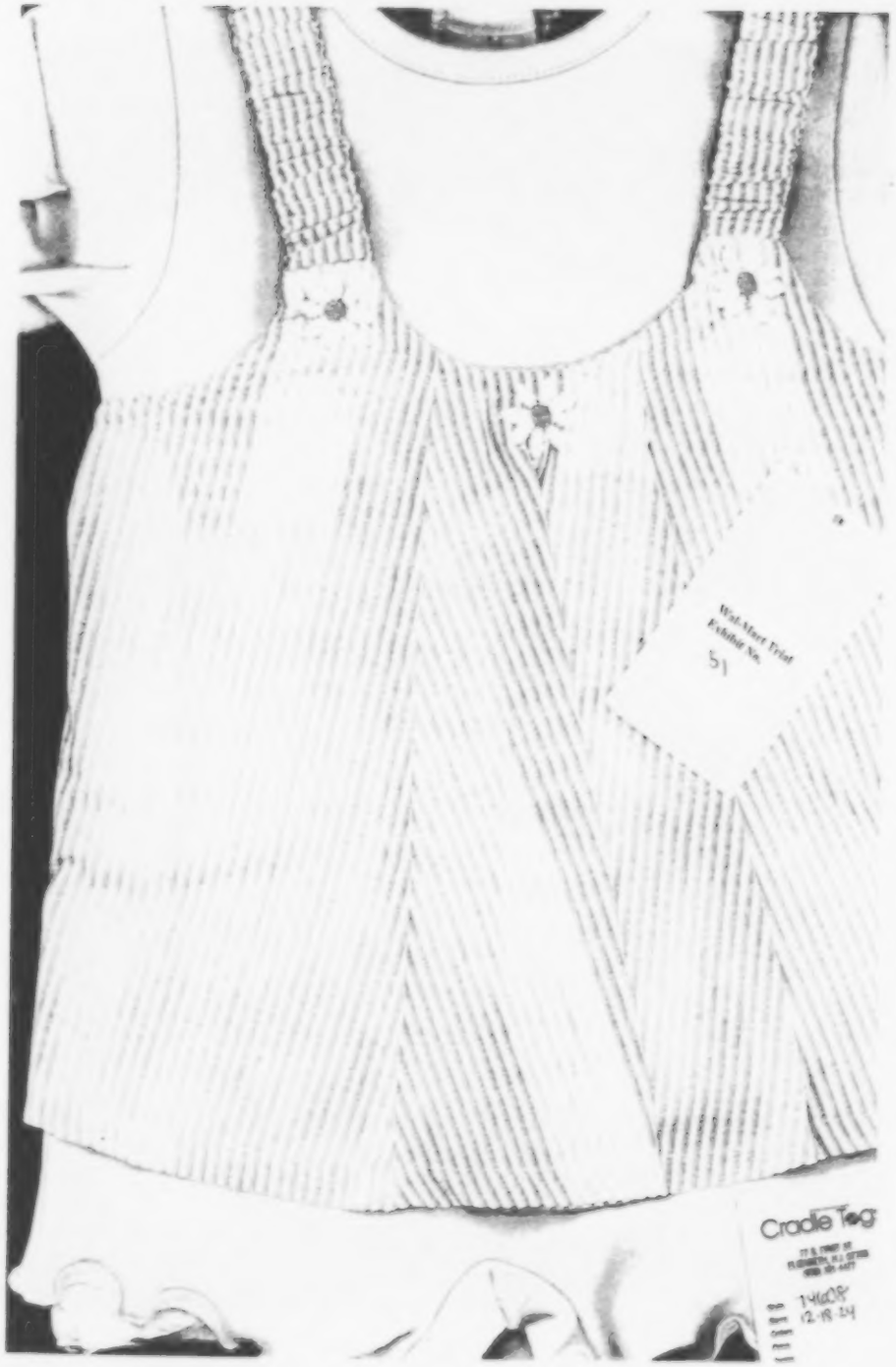
JA-231

Wal-Mart Trial Exhibit No. 50



JA-232

Wal-Mart Trial Exhibit No. 51

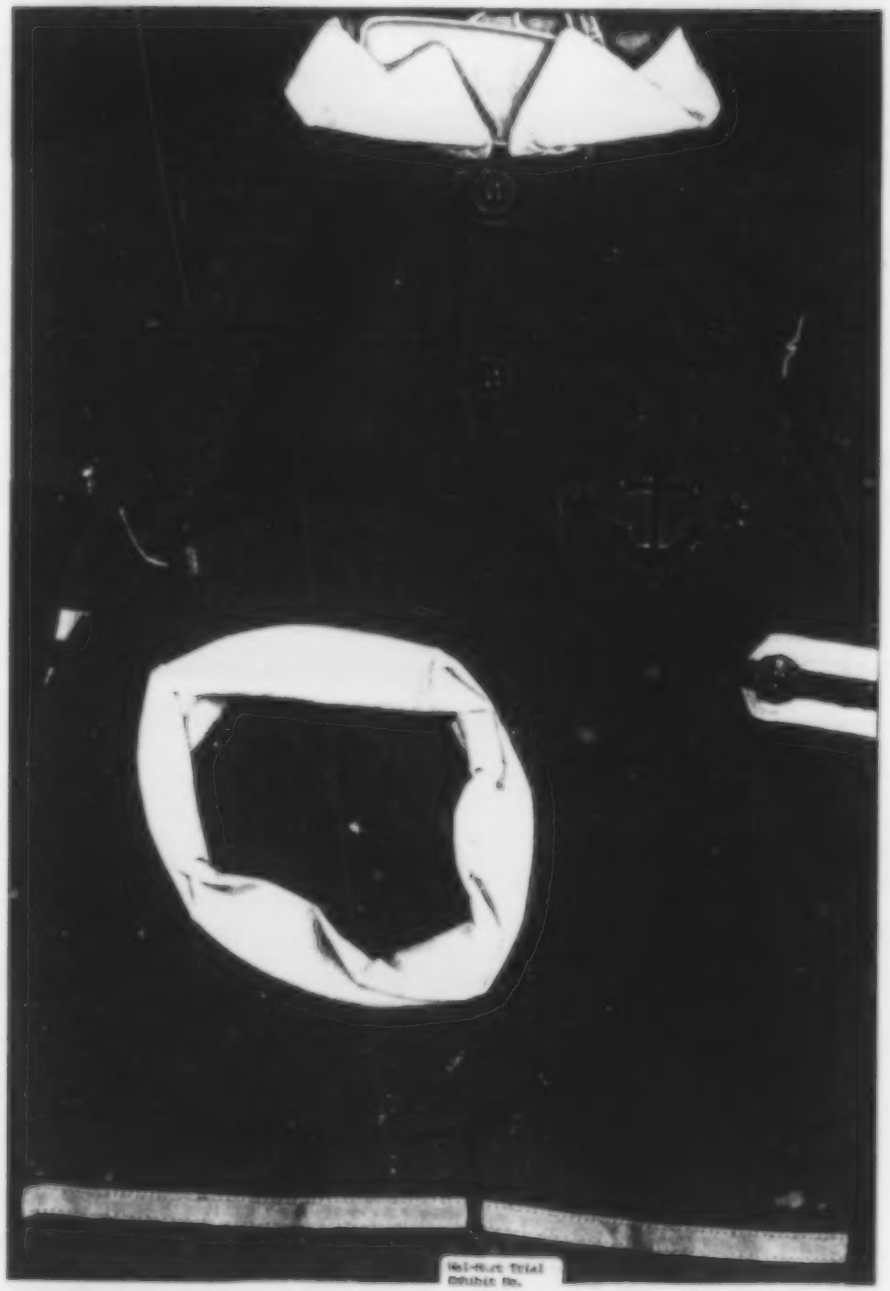


JA-233

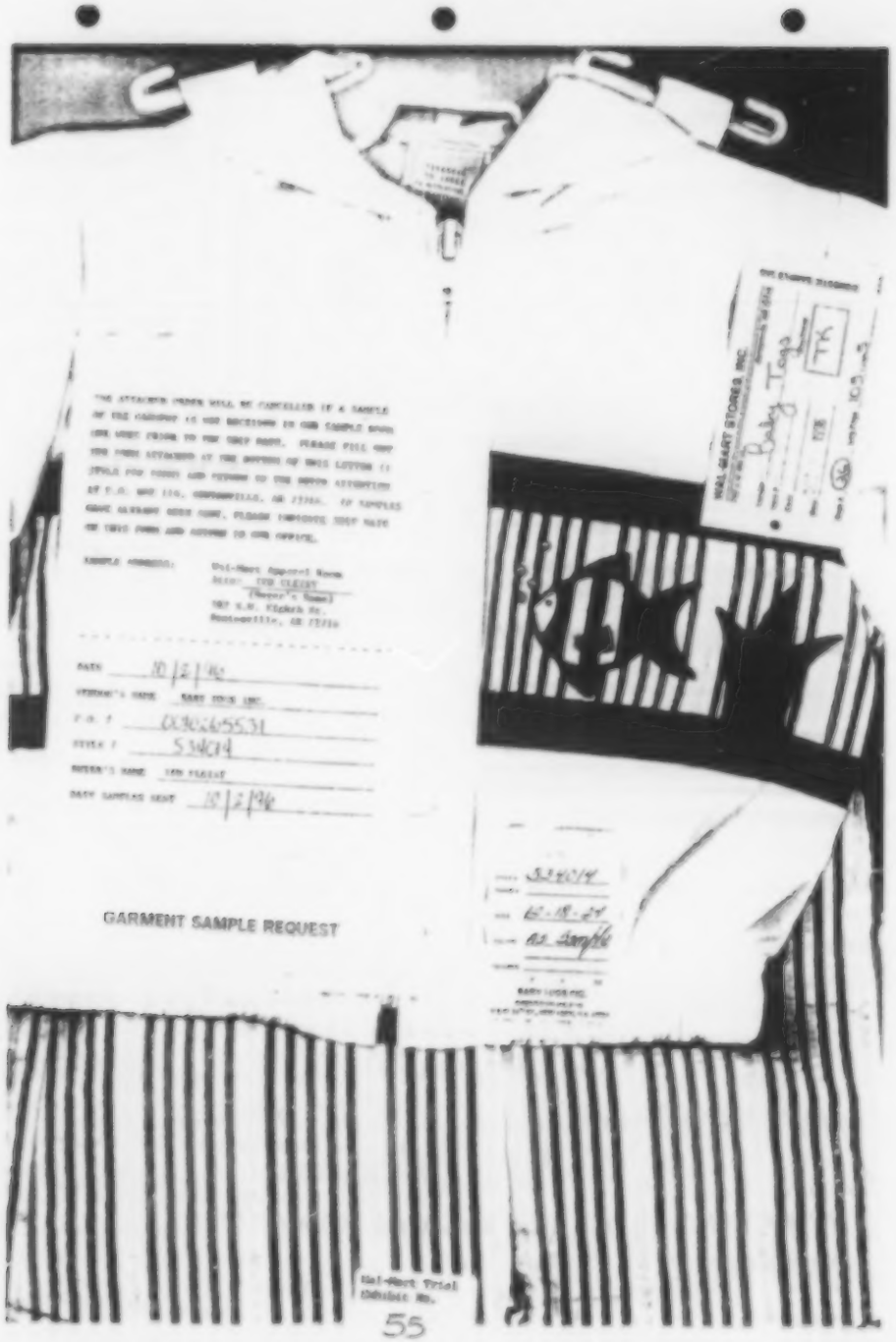
Wal-Mart Trial Exhibit No. 52

Wal-Mart Trial Exhibit No. 53

Wal-Mart Trial Exhibit No. 54



Wal-Mart Trial Exhibit No. 55



Wal-Mart Trial Exhibit No. 56

THE ATTACHED ORDER WILL BE CANCELLED IF A SAMPLE OF THE GARMENT IS NOT RECEIVED IN OUR SAMPLE ROOM ONE WEEK PRIOR TO THE SHIP DATE. PLEASE FILL OUT THE FORM ATTACHED AT THE BOTTOM OF THIS LETTER (1 STYLE PER FORM) AND RETURN TO THE BUYER ATTENTION AT P.O. BOX 116, BENTONVILLE, AR 72716. IF SAMPLES HAVE ALREADY BEEN SENT, PLEASE INDICATE SHIP DATE ON THIS FORM AND RETURN TO OUR OFFICE.

SAMPLE ADDRESS: Wal-Mart Apparel Room
Attn: TED VLEEST
(Buyer's Name)
702 S.W. Eighth St.
Bentonville, AR 72716

DATE 10/2/96

VENDOR'S NAME BABY TOGS INC.

P.O. # 0010268645

STYLE # 422563

BUYER'S NAME TED VLEEST

DATE SAMPLES SENT 10/2/96

GARMENT SAMPLE REQUEST

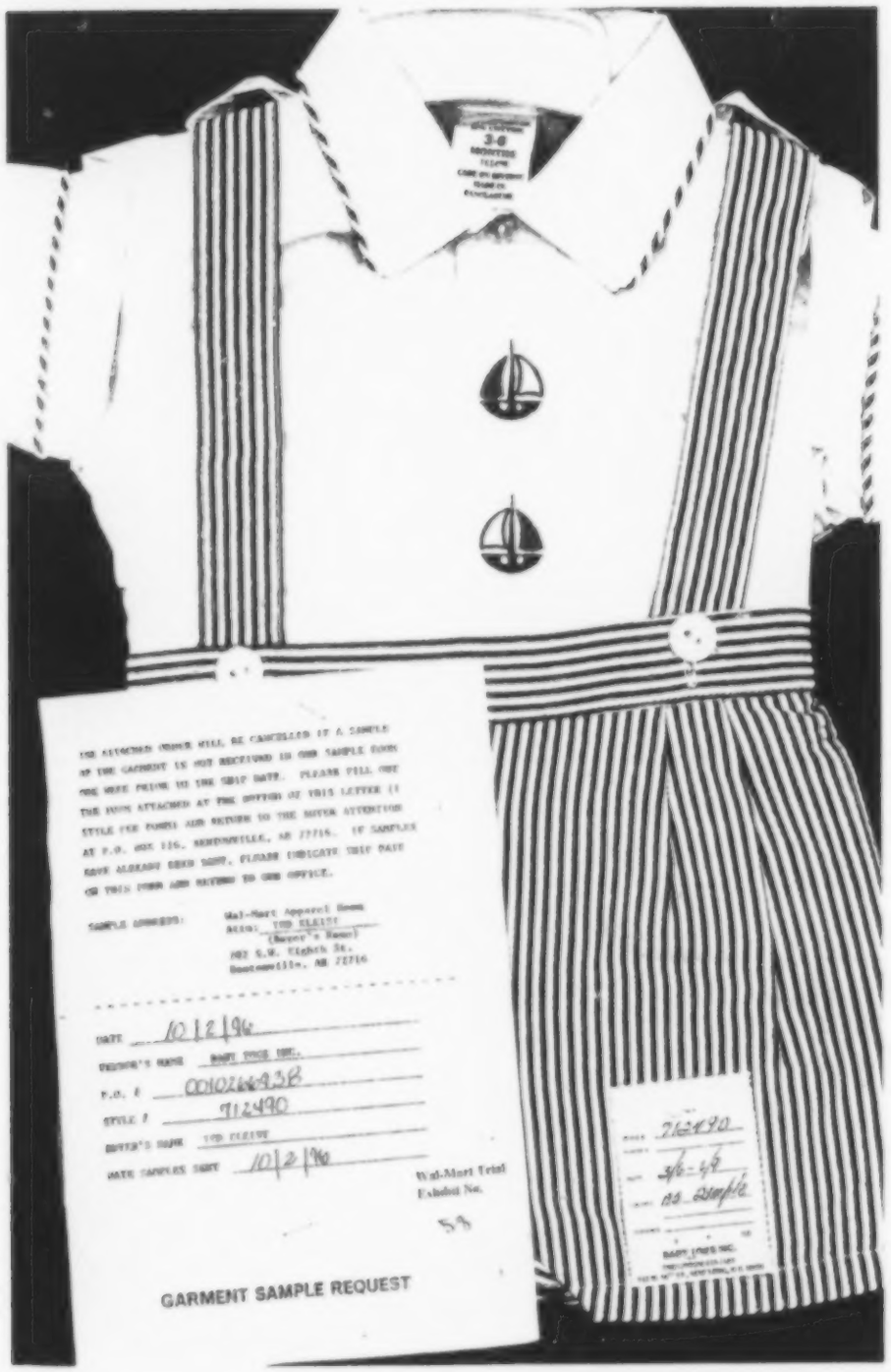
Wal-Mart Trial Exhibit No. 56

422563
12-18-24
1pc Sample

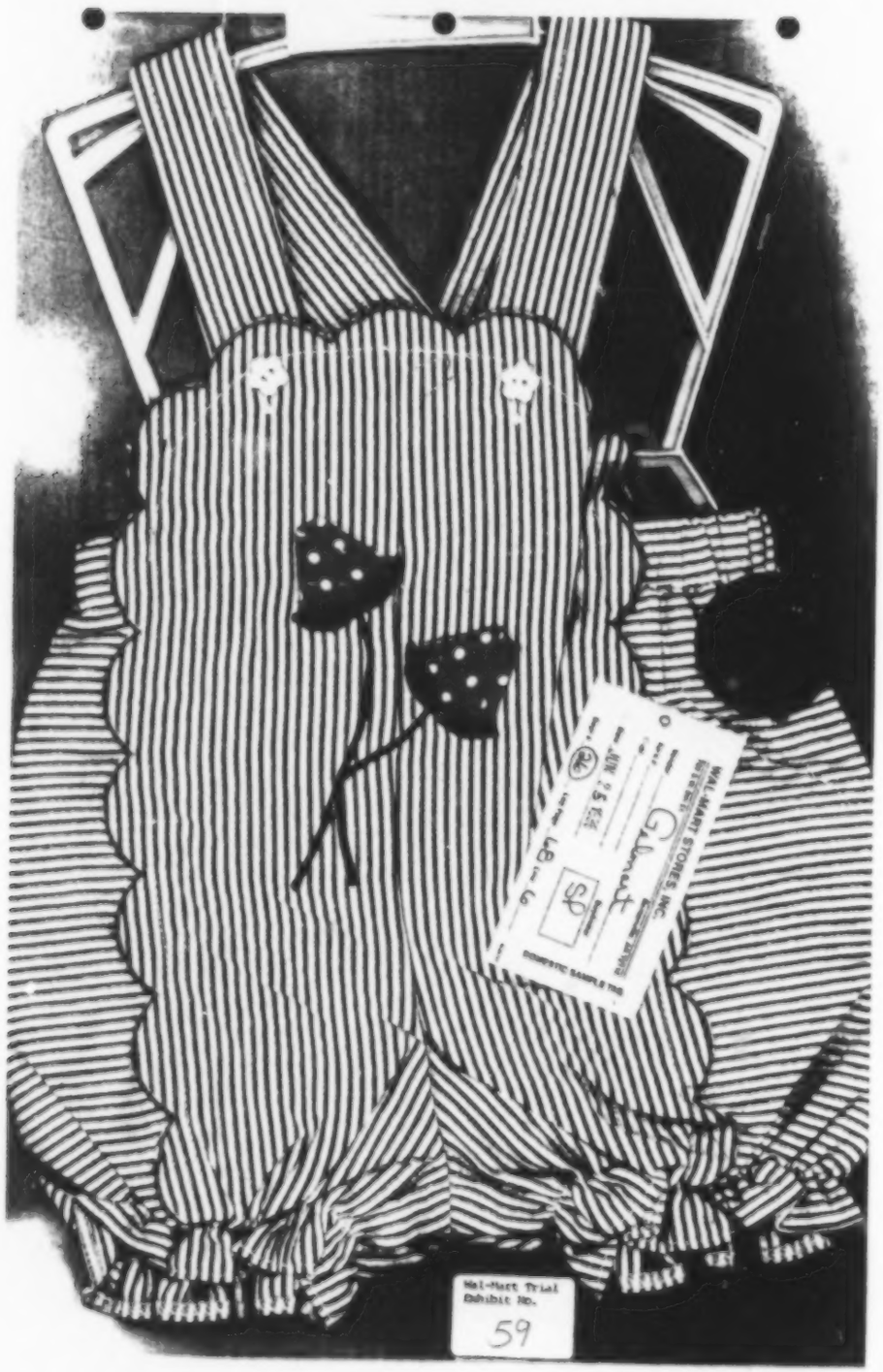
JA-238

Wal-Mart Trial Exhibit No. 57

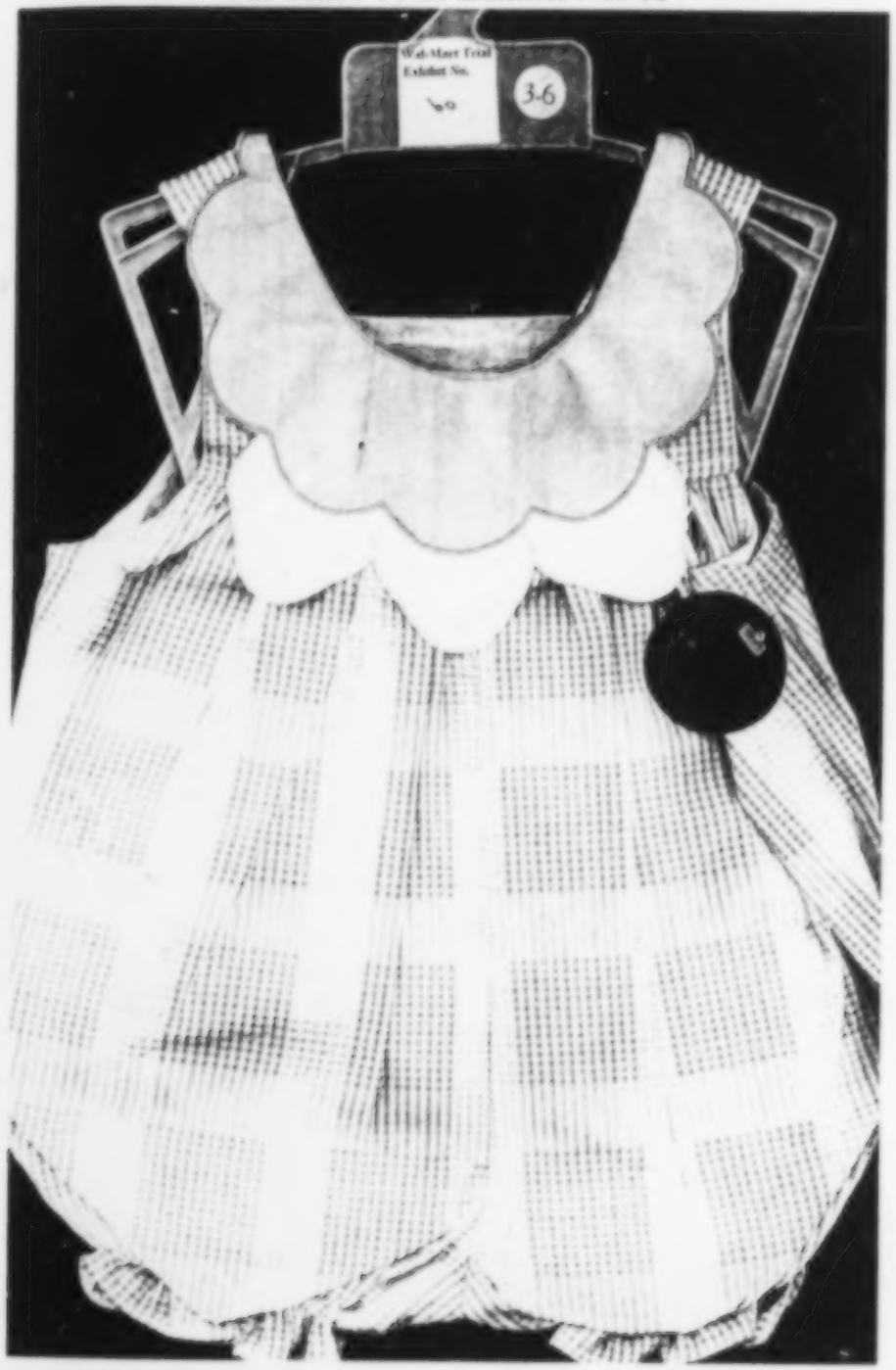
Wal-Mart Trial Exhibit No. 58



Wal-Mart Trial Exhibit No. 59

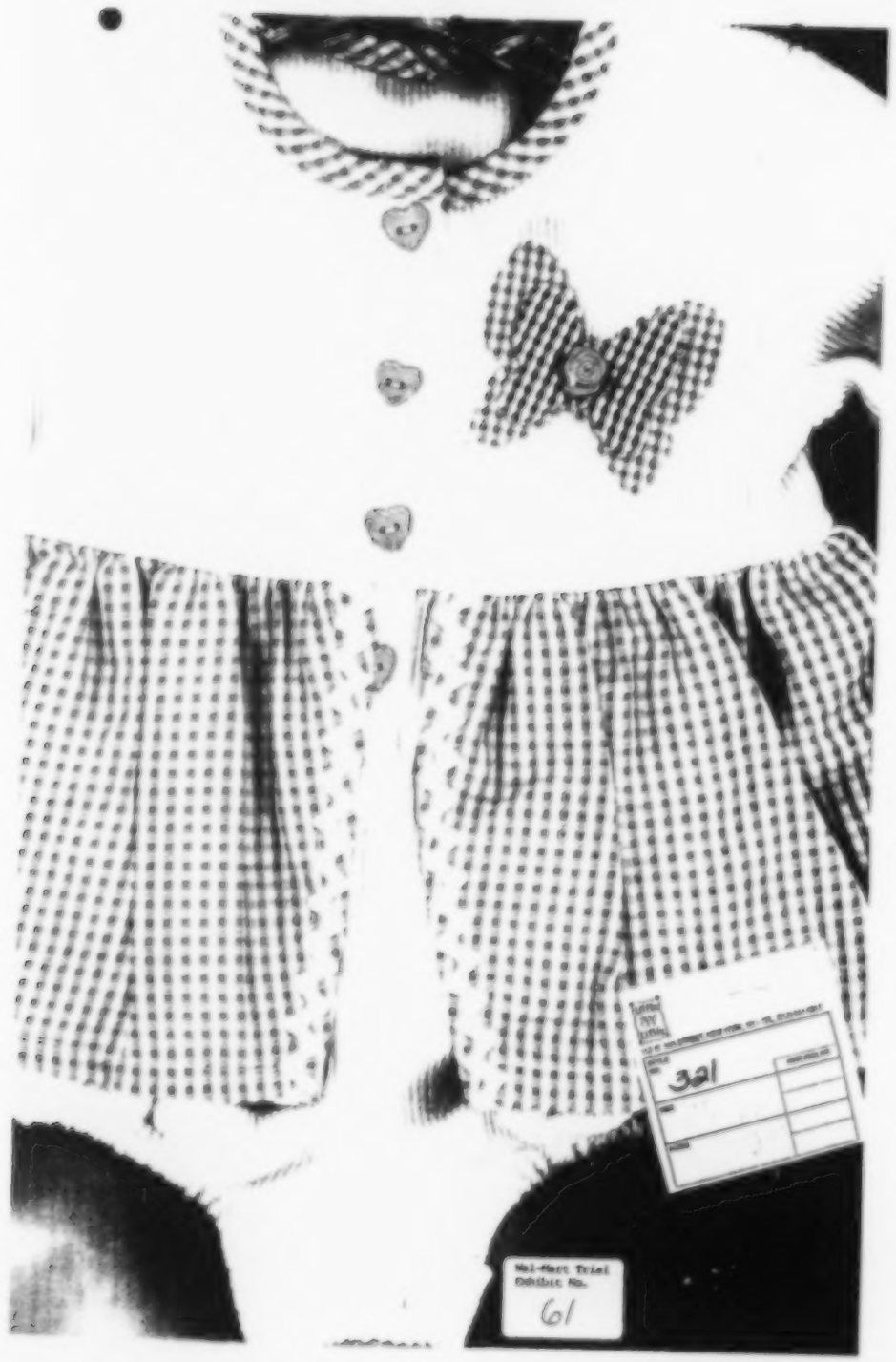


Wal-Mart Trial Exhibit No. 60



JA-242

Wal-Mart Trial Exhibit No. 61



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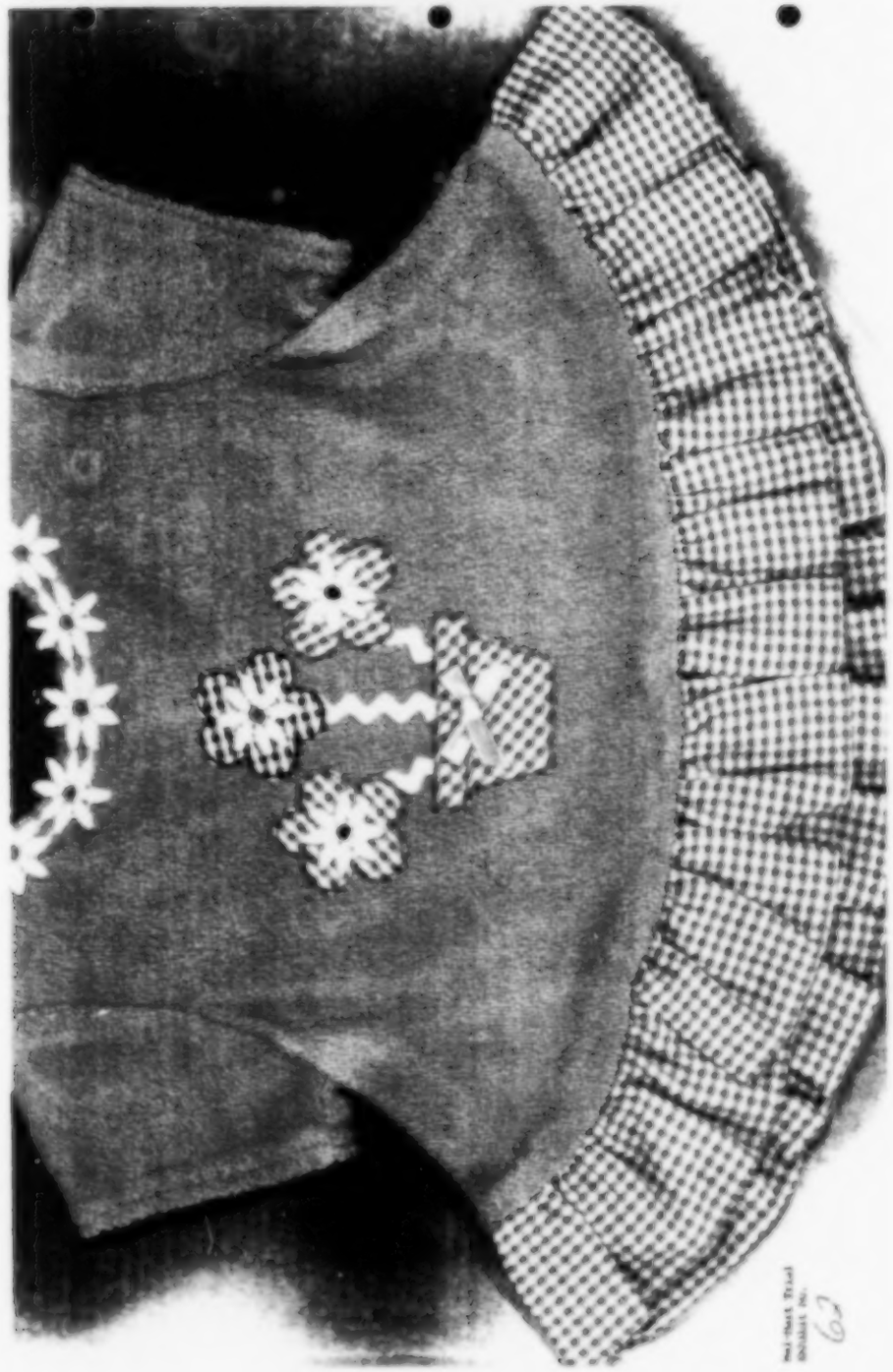
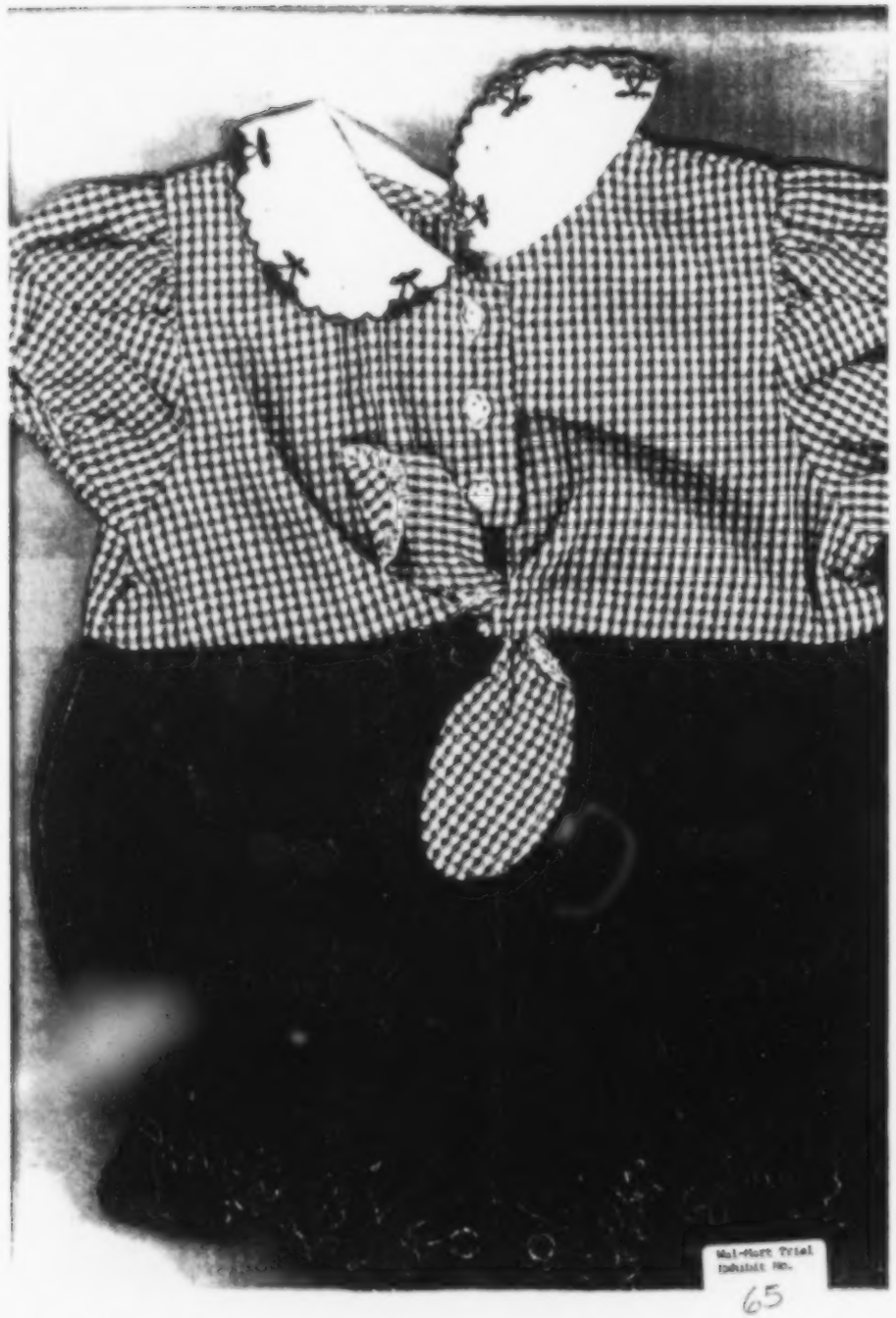


Wal-Mart Trial Exhibit No. 63

Wal-Mart Trial Exhibit No. 64

Wal-Mart Trial Exhibit No. 65



Wal-Mart Trial Exhibit No. 66

JA-248

Wal-Mart Trial Exhibit No. 67

Wal-Mart Trial Exhibit No. 68

Wal-Mart Trial Exhibit No. 69

JA-251

Wal-Mart Trial Exhibit No. 70

Wal-Mart Trial Exhibit No. 71

Wal-Mart Trial Exhibit No. 72

Wal-Mart Trial Exhibit No. 73

JA-255

Wal-Mart Trial Exhibit No. 88

1

9008

SIZE

Wal-Mart Trial Exhibit No. 88

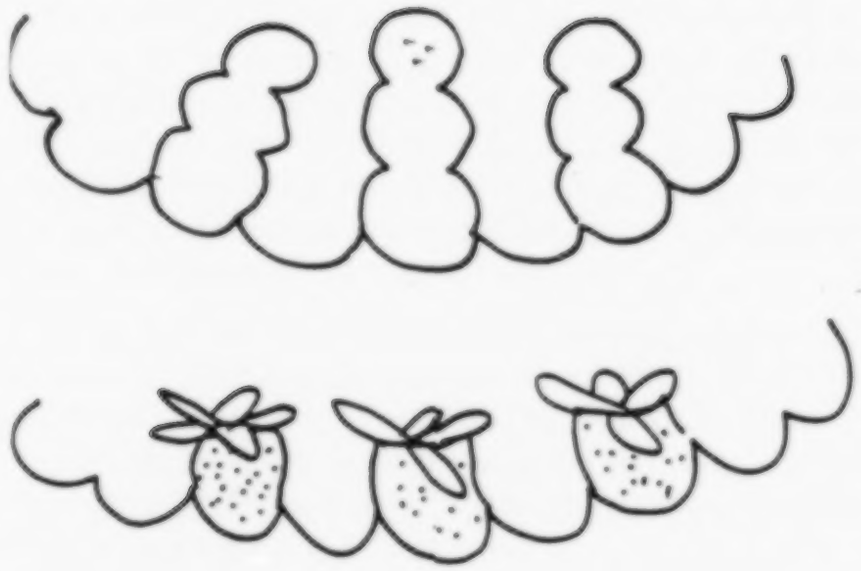
Simplicity

Design your own

romper and dress / barboteuse et robe

JA-256

Wal-Mart Trial Exhibit No. 102



JURY CHARGE NO. 11 PROPOSED BY DEFENDANT, WAL-MART STORES, INC.

11. Descriptive Terms – Secondary Meaning

In this case, Samara Brothers, Inc. claims that by April 14, 1996, it had established the overall appearance of its seersucker children's garments as a trade dress. To this claim, the defendant, Wal-Mart, contends that there is nothing inherently distinctive about the appearance of plaintiff's seersucker children's clothing. This, then is the first question for you to answer. Is the appearance of plaintiff's seersucker children's clothing inherently distinctive? It will help you to answer this question if you consider whether the overall appearance of plaintiff's products serve the purpose of identifying the source of the goods as Samara and distinguishing them from the goods of other manufacturers of children's clothing.

If you find that the goods are not inherently distinctive, then you will next consider whether the evidence shows that plaintiff has so used the appearance of its seersucker children's clothing as to develop a secondary meaning such as to identify Samara Brothers, Inc. to a significant number of the consuming public as the source of these garments.

The overall appearance of plaintiff's seersucker children's garments can become protectible trade dress if such a secondary meaning has been developed for it by usage in the marketplace. A significant number of the consuming public must have associated the appearance of this clothing with the plaintiff before April 14, 1996, the date upon which the defendant first sold its merchandise. It is for you to decide how many constitute a significant number.

The fundamental question for you to answer, however, is whether the *primary* significance of the appearance of plaintiff's seersucker children's clothing in the minds of the

consuming public is not the product but the producer. You are also entitled to take into consideration the relevance of plaintiff's trademark, "SAMARA" on the labelling placed on its clothing in consumers' ability to distinguish plaintiff's products from those of other manufacturers. If the label, and not the overall appearance of the product, provides consumers with the impression that it is a Samara product, then plaintiff has not proved that it has protectible trade dress.

Authorities: *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1006-09 (2d Cir. 1995); *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 24 U.S.P.Q.2d 1161, 1165-66, 1171 (2d Cir. 1992); *Union Manufacturing, Inc. v. Ham Baek Trading Co., Ltd.*, 763 F.2d 42, 47-48 (2d Cir. 1985); *Krueger Intern, Inc. v. Nightingale, Inc.*, 915 F. Supp. 595, 604 (S.D.N.Y. 1966).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

– against –

WAL-MART STORES, INC.,
Defendant.

JURY CHARGE
January 9, 1997

DENNY CHIN
United States District Judge

* * * *

B. ***Trade Dress***

The second claim you are to consider is one for trade dress infringement.

1. ***Definition of Trade Dress***

Trade dress is an expansive concept that includes the overall appearance of a product, including its size, shape, color, texture, graphics, labels, packaging, or other visual features. These elements combine to create the total visual image by which the product is offered to customers as a symbol of the product's origin. In other words, trade dress is the total image or overall impression of a product.

The trade dress of a commercial product has two fundamental purposes. One objective is to protect the property

rights of a trade dress owner by maintaining control over a product's reputation and goodwill. In this regard, trade dress acts as an authentic seal that vouches for the origin and quality of a particular product.

But a selected trade dress has another important purpose. It also protects consumers from being misled as to the nature and source of the products they buy. Consumers are entitled to know what they are buying and, in connection with brand name products, they are entitled to expect the same product from the same source even if they cannot identify the business or company that makes or sponsors the product.

Protectable trade dress rights are the exclusive property of the trade dress owner. On this basis, no other company can use a trade dress that is likely to cause confusion, mistake, or deception as to the source of commercial goods. In other words, a trade dress owner has the right to stop a competitor from using a trade dress that is confusingly similar to the owner's protectable trade dress.

When packaging a competitive product, a second comer in the market has an affirmative obligation to adopt a trade dress that does not cause confusion with the protectable trade dress of any earlier, existing products.

a. *Elements of Trade Dress Infringement*

To succeed on its claim for damages for trade dress infringement, Samara must prove two elements by a preponderance of the evidence:

First, that the trade dress of its designs is legally protectable; and

Second, that the trade dress of the Wal-Mart product you are considering is so similar to the protectable Samara Brothers' trade dress that it caused actual consumer confusion.

(i) *Legally Protectable Trade Dress*

To be legally protectable, a product's trade dress must be distinctive, meaning that it is either inherently distinctive or has acquired a secondary meaning in the marketplace.

(a) *Distinctiveness*

To be distinctive, a product's trade dress must be capable of identifying the producer or source of the product and distinguishing the product from the competition, even if consumers do not know the name of the source. There are two ways that a product's trade dress can be distinctive. First, it can be inherently distinctive and, second, it can become distinctive by acquiring a secondary meaning in the marketplace. In assessing the distinctiveness of the trade dress of Samara's designs, you should consider the appearance of the trade dress as a whole, rather than focusing on a single aspect of its design.

Trade dress features that are commonplace or customarily used to package products in a given industry are generally not distinctive so as to set the goods of a particular seller apart from the competition.

Moreover, trade dress law does not protect ideas or concepts, but only their expression. The overall inquiry in determining whether the trade dress is distinctive is whether the trade dress identifies the source of the product.

i) *Inherently Distinctive*

A trade dress is inherently distinctive if its intrinsic nature serves to identify a particular source of the product. An inherently distinctive trade dress is one that is likely to serve primarily as a designator of origin of the product, taking into consideration the nature of the trade dress and the context in which it is used. In determining whether the trade dress is

inherently distinctive, you should consider the combination of elements forming the product's overall appearance.

A trade dress that is arbitrary or fanciful is always inherently distinctive. A trade dress that is suggestive is also inherently distinctive. A trade dress is suggestive if it suggests rather than describes the characteristics of the product, requiring the purchaser to use his or her imagination, thought, and perception to determine what the product is. In contrast, a trade dress that is descriptive, meaning that it describes the qualities or characteristics of the product, is not inherently distinctive but may become distinctive by acquiring secondary meaning in the marketplace. In determining whether the trade dress of Samara's designs is inherently distinctive, you should consider the combination of elements forming the product's overall appearance, rather than examining each element separately.

ii) *Secondary Meaning*

A product's trade dress will have become distinctive by acquiring secondary meaning where the purchasing public has come to associate the trade dress with a single source or producer of the product, even if the name of the source is not known. In other words, Samara must show that the trade dress of its designs has, over time, become identified with its producer in the minds of potential customers. Factors to be considered in determining whether a product's trade dress has acquired secondary meaning include: plaintiff's advertising expenditures; consumer surveys linking the trade dress to a particular source; sales success; unsolicited media coverage; attempts to plagiarize the trade dress; the length and exclusivity of the use of the trade dress; and advertising promoting an association between the product and the source of the product.

Intentional copying also constitutes evidence of consumer recognition and secondary meaning, although it does

not by itself conclusively establish secondary meaning. Rather, evidence of intentional copying must be considered together with all the evidence in the case.

Samara has the burden of proving secondary meaning. The mere fact that Samara is using its trade dress, or that Samara began using it before Wal-Mart, does not mean that it has obtained secondary meaning. There is no particular length of time that trade dress must be used before it obtained a secondary meaning.

(ii) *Actual Confusion*

If you find by a preponderance of the evidence that Samara has proven that the trade dress of its designs is legally protectable, you must then consider the second element: actual confusion. Samara must prove by a preponderance of the evidence that the allegedly infringing trade dress of the Wal-Mart product caused actual consumer confusion.

Actual confusion may be shown by, among other things, testimony from consumers who were actually confused by the trade dress or by market surveys demonstrating actual consumer confusion.

Even if you find that Samara did not prove actual confusion, you may presume that there was actual confusion if Samara shows that Wal-Mart engaged in intentional deception. That presumption is a rebuttable one, and hence, if you find that Wal-Mart engaged in intentional deception, then the burden will shift to Wal-Mart to show by a preponderance of the evidence that there was no actual confusion. In that case, if Wal-Mart shows that there was no actual confusion, it will have met its burden to rebut the presumption and you must find in favor of Wal-Mart in this respect. If Wal-Mart does not show an absence of actual confusion in the face of proof of intentional deception, then Wal-Mart will not have rebutted the

presumption and you must find in favor of Samara in this respect. Remember, however, that Samara must first show that Wal-Mart engaged in intentional deception to give rise to the presumption of actual confusion.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

v.

JUDY-PHILIPPINE, INC., K MART CORPORATION,
THE CALDOR CORPORATION, WAL-MART STORES, INC.,
HILLS DEPARTMENT STORES, INC.,
GOODY'S FAMILY CLOTHING, INC.
and JOHN DOES 1-50
Defendants.

MOTION FOR JUDGMENT OR, IN THE ALTERNATIVE, REQUEST FOR NEW TRIAL

Defendant Wal-Mart Stores, Inc., by counsel, respectfully moves for judgment pursuant to FED. R. CIV. P. 50 or, in the alternative, for a new trial pursuant to FED. R. CIV. P. 59. The grounds for Wal-Mart Stores, Inc.'s motion are set forth in the accompanying Memorandum in Support, incorporated herein by reference.

Respectfully submitted,
/s/ William D. Coston
William D. Coston (WD4192)
Barbara L. Waite (BW4029)
VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
1201 New York Avenue, NW, Suite 1000
Washington, DC 20005-3917
Telephone: (202) 962-4800
Fax: (202) 962-8300
Attorneys for Defendant WAL-MART STORES, INC.

Dated: 1/31/97

* * * *

A. Legally Protectable Trade Dress

Samara spent considerable time in attempting to prove a case that there was a "Samara Look." None of its witnesses, however, could define this "look." It offered *no* evidence that actual consumers could even recognize this "look", much less recognize it as an indicator of the source of the garment. In other words, it did not put forth a legally sufficient evidentiary basis for a reasonable jury to find either that: (i) its trade dress was inherently distinctive; or (ii) that its trade dress had acquired a secondary meaning in the marketplace. (Jury Charge, Tr. at pp. 666-67); *Two Pesos, Inc.*, 505 U.S. at 769.

i. Inherently Distinctive

A trade dress is inherently distinctive if its intrinsic nature serves to identify a particular source of the product. (Jury Charge, Tr. at p. 667); *Two Pesos, Inc.*, 505 U.S. at 768; *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1008 (2d Cir. 1995)("*Knitwaves*"). The test of whether a trade dress is inherently distinctive thus includes both an element of distinctiveness and an element of the purpose intended to be served by the appearance. In order to be inherently distinctive, protectable trade dress, the trade dress features must be distinctive enough "so as to set the goods . . . apart from the competition."[2] (Jury Charge, Tr. at p. 667); *Two Pesos, Inc.*,

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[2] Trademark law requires a showing of distinctiveness, in part, because it is bad policy for the law to allow an indefinite "look" to be appropriated as protectable trade dress. As explained in McCarthy's treatise on Trademarks,

> In some cases, neither the plaintiff nor the court defines exactly what the trade dress consists of, except, for vague and indeterminate references to the 'overall appearance' or 'look' .... [t]his may well leave defendant uncertain as to what to do to avoid a charge of contempt and create dangers of anti-competitive overprotection....[t]he law of trade dress should not be used as an anti-competitive weapon based upon undefined claims of 'trade dress.'

MCCARTHY ON TRADEMARKS at § 8:3.

505 U.S. at 768. In addition, the *primary* purpose of the trade dress must be to serve as an identifier of the source of the goods. (*See* Jury Charge, Tr. at p. 667); *Knitwaves*, 71 F.3d at 1009. Product features and designs whose primary purpose is likely aesthetic do not qualify as inherently distinctive. *Knitwaves*, 71 F.3d at 1009 ("As Knitwaves' objective in the two sweater designs was primarily aesthetic, the designs were not *primarily* intended as source identification. Those sweater designs therefore fail to qualify for protection of trade dress inherent in product design. Accordingly, the judgment in favor of Knitwaves on the Lanham Act claim must be reversed.")(emphasis added); *Banff Ltd. v. Express, Inc.*, 921 F.Supp. 1065, 1071 (S.D.N.Y. 1994)(Following a jury verdict, this Court granted judgment as a matter of law for defendant on trade dress infringement, finding that design on sweater was not protectable trade dress because plaintiff, "like the plaintiff in *Knitwaves*, chose its design primarily for aesthetic reasons.")

First, Samara failed to prove with a legally sufficient evidentiary basis that its trade dress features were distinctive enough to set it apart from the competition. Samara's witnesses themselves, the actual creators and designers of the so-called "Samara Look," could not articulate what, if anything, about the trade dress made it inherently distinctive. Katherine Gosda, Samara's chief design witness and a self-described leading authority on the "Samara Look," (Tr. at p. 193, 17-20), admitted that it took her "a while" to "learn" the look, (Tr. at p. 151, 10-12), testimony that is directly inconsistent with a finding that the look is inherently distinctive. In addition to her

difficulty in learning the look, Ms. Gosda had trouble identifying it. In fact, although a designer of Samara's children's garments for six years, and an authority on the "Samara Look," Ms. Gosda affirmatively identified Wal-Mart Trial Exhibit 58, a garment manufactured by Baby Togs, as having the "Samara Look." (Tr. at p. 171). Ms. Gosda was also uncertain as to whether Wal-Mart Trial Exhibit 10, a dress manufactured by All Mine, was a Samara. (Tr. at p. 202).

In addition, Gary Goldman, Samara's Vice President of Sales and only other design witness, testified that other companies make garments that have the "Samara Look." He explained that other companies may not make an entire line with the "Look" but that particular garments within their lines do look like Samara's. (Tr. at pp. 251-252)("Q: So with respect to the one garment, however, that garment might look like the Samara garment, that is your testimony? A: I would say yes.").

Further, neither of the Samara design witnesses could reasonably articulate exactly what defined the "Look." In their testimony, Ms. Gosda and Gary Goldman spent a lot of time explaining what the "Look" is *not*, but were very inarticulate in defining exactly what the look is. For example, Ms. Gosda testified that the look is "hard to put into words, but there is a look." (Tr. at p. 151, 10-11). Mr. Goldman was no more definite. "Q: What would make the Samara look? A: It's just the feel of the garment. It's something that you have to understand being there doing it for 15 years, caring about it maybe." (Tr. at p. 262, 18-21). It defies reason and is sheer surmise to find that average, everyday consumers would recognize the "Samara Look," a look that its designers needed to "learn" or be around for years to understand (yet still could not articulately define or infallibly identify) and that one of its designers admitted was produced by other companies, as inherently distinctive.

Second, Samara put forth no evidence in this case that the purpose in designing the "Samara Look" was for anything other than aesthetics, an unprotectable trade dress purpose. Samara's lead design witness, Katherine Gosda, made that much evident in her testimony. On direct examination, Ms. Gosda repeatedly implied that the purpose of the "Samara Look" was to appear aesthetically pleasing, not for the purpose of identifying the source of the garment. For example, Ms. Gosda described her technique in designing the appearance of a garment with a three-car applique this way:

> So, when I do newborn and infant items, I make it what I called rounded. I want them to be soft, cute, that kind of thing. So, I made it rounded. And being three cars, I made it simple. There's no bumpers, headlights. There's nothing like that on the car.
>
> You don't want anything making your eye go a little crazy. So, I made it rounded and split the window, just to make it a little interesting. If there's one big glob of yellow, yellow is a strong color and is going to hit you right in the face.
>
> And the wheels, you notice there's a center color. So, in the center color, it's a yellow, too, balancing the yellow. Yellow is a very strong color.
>
> And that's pretty much where my conscious decisions came up doing that applique.

(Tr. at p. 148, 3-17). In describing how she learned the "Look," Ms. Gosda's again made it evident that the purpose behind the overall design is aesthetic, not identification:

> I call the Samara look simple-like elegance, or simple sophistication. When I first started working at Samara it took me a while to get it because I came from different companies that did things much more racy.

> There were more elements in the items. But when you look at a Samara garment they are simple. They are not too simple where you are bored with them but they are simple. They look sophisticated. They look boutiquey. They look very, very nice.

(Tr. at p. 151, 1-9).

Third, trade dress features that are commonplace or customarily used to package products in a given industry are generally not inherently distinctive. (Jury Charge, Tr. at p. 667); *Two Pesos, Inc.*, 505 U.S. at 768; *Knitwaves*, 71 F.3d at 1008. Because so many common themes and fabrics recur year-after-year in the children's clothing industry, it would be difficult, if not impossible, to create an inherently distinctive look based on those themes and fabrics. For example, Katherine Gosda testified that sailboats, cars, strawberries, hearts, ric rac, tulips, and trucks are all common themes in children's clothing. (Tr. at p. 186)(*see also* deposition testimony of Patricia Hamilton (Tr. at pp. 545-47) and deposition testimony of Barbara Lenhardt (Tr. at p. 568) describing common themes in children's wear). Ms. Gosda "borrowed" the appearance of an automobile to make her design. (Tr. at p. 184). She also agreed that appliques are a traditional method of decorating children's garments,. (Tr. at p. 187), and testified that she bases her designs in part on what other people in the industry are selling. (Tr. at pp. 187-88). These same themes are used, copied, and repeated over and over in children's garments and cannot serve to distinguish one children's garment manufacturer's look from another.

ii. Secondary Meaning

In order to demonstrate that its trade dress has become distinctive through secondary meaning, a plaintiff must show that its trade dress has become identified with a single source or producer of the designs in the minds of potential customers. (Jury Charge, Tr. at p. 668); *George Basch Co., Inc. v. Blue Coral, Inc.*, 968 F.2d 1532, 1536 (2d Cir. 1992)("*Blue Coral*"). "'Proof of secondary meaning entails vigorous evidentiary requirements.'" *Thompson Medical Co., Inc. v. Pfizer, Inc.*, 753 F.2d 208, 217 (2d Cir. 1985). Many factors may be considered in making this determination, most notably: (1) advertising expenditures; (2) consumer studies linking the name to the source; (3) sales success; (4) unsolicited media coverage of the product; (5) prior attempt to pirate the mark; and (6) duration of plaintiff's exclusive use of the mark. *Id.* Further, as Judge Sotomayer of this Court recently observed, "[i]n *Knitwaves*, the [Second Circuit] examined the clothing market and concluded that when people buy clothing, they do not tend to use overall design as an indicator of source." *Krueger Int'l, Inc. v. Nightingale, Inc.*, 915 F.Supp. 595, 603 (S.D.N.Y. 1996).

The record here shows that Samara introduced scant evidence of its advertising—brief testimony concerning cooperative advertising and three newspaper ads—and evidence of its sales of 140,000 dozen garments in 1995 and 130,000 dozen garments in 1996. (Tr. at p. 58, 63-65). It introduced evidence that it had been using its alleged trade dress since 1985. (Tr. at p. 211).

What Samara did not offer into evidence is more telling. It offered no evidence by which to compare its advertising expenditures or sales revenues to others in its industry. It offered no evidence to suggest efforts to promote association between the alleged "Samara Look" and its source. It offered no evidence of unsolicited media coverage. Samara also introduced testimony from its own witnesses that they believed consumers would recognize the "Samara Look," but this testimonial evidence is entitled little weight. *See Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324, 1333 (8th Cir. 1985)(self-serving testimony of plaintiff that some of his consumers were confused held insufficient to establish secondary meaning of plaintiff's mark.).

It offered no evidence from actual consumers that they recognized a "Samara Look." "[W]here the other evidence of consumer recognition is hardly overwhelming, the absence of survey evidence weighs heavily against plaintiff's position." *Brown v. Quiniou*, 744 F.Supp. 463, 470 (S.D.N.Y. 1990). Because Samara did not offer any evidence that customers recognized or identified the "Look" with any particular source, a factual finding on the issue of secondary meaning would be based on pure conjecture.

There is no evidence in the record to support a factual finding of either inherently distinctive trade dress or secondary meaning. Therefore, Samara's claim of protectable trade dress must fail as a matter of law.

* * * *

Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

v.

JUDY-PHILIPPINE, INC., K MART CORPORATION,
THE CALDOR CORPORATION, WAL-MART STORES, INC.,
HILLS DEPARTMENT STORES, INC.,
GOODY'S FAMILY CLOTHING, INC.,
and JOHN DOES 1-50,
Defendants.

CONSENT ORDER

The parties hereto stipulate and agree as follows:

Factual Recitals

1. Plaintiff Samara Brothers, Inc. ("Samara") commenced this action on July 2, 1996, alleging trade dress and copyright infringement with respect to certain garments manufactured and sold by defendant Judy Philippine, Inc. ("JPI"), and offered for resale and sold by defendants Hills Department Stores, Inc., ("Hills"), The Caldor Corporation ("Caldor"), Goody's Family Clothing, Inc., ("Goody's") and Kmart Corporation ("Kmart") (JPI, Hills, Caldor, Goody's and Kmart collectively are hereinafter referred to as "defendants," and defendants other than JPI are hereinafter referred to hereinafter as "retailers").

2. On July 5, 1996 this Court issued an order, with the consent of JPI. Temporary restraining JPI from manufacturing, selling, importing, displaying or engaging in commerce in allegedly infringing garments.

3. Trial of this matter is set for January 6, 1997. Discovery is to close December 13, 1997.

4. Defendant JPI is a corporation organized and existing under the laws of New York. It manufactures, imports and distributes, among other things, children's clothing. JPI is headquartered within this district, with offices located at 1370 Broadway, New York, New York.

5. Defendant K Mart Corporation ("K Mart") is a corporation incorporated under the laws of Michigan. Its principal place of business is in Troy, Michigan. K Mart does business in this State and this district. K Mart is a national retailing chain.

6. Defendant The Caldor Corporation ("Caldor") is a corporation organized and existing under the laws of Delaware. Caldor is a debtor in a Chapter 11 case currently pending before this Court, and all acts alleged in this Complaint occurred after the commencement of its Chapter 11 case. Caldor is a retailing chain with stores throughout the Northeastern section of the United States.

7. Defendant Hills Department Stores, Inc. ("Hills") is a corporation duly organized and existing under the laws of Delaware. Hill's principal place of business is in Canton, Massachusetts. Hills is a retailing chain with stores throughout the Northeastern section of the United States.

8. Defendant Goody's Family Clothing, Inc. ("Goody's) is a corporation duly organized and existing under the laws of Tennessee. Its principal place of business is in Knoxville,

Tennessee. Goody's is a retailer of clothing and apparel, with stores in the Southeastern and Midwestern United States.

9. Samara is a corporation organized and existing under the laws of Delaware. Samara manufactures and sells childrens clothing, including a line of appliqued children's spring/ summer seersucker garments. JPI acknowledges that it is on notice that Samara claims a trade dress in the appearance of the line of applied seersucker children's spring/summer clothing, consistent across the line and consistent from year to year. The look constituting the claimed trade dress is a complex of features that together create a distinctive overall appearance, including the overall combination of uncluttered large appliques, often integrated into the construction of the garment, careful color coordination, and lack of excess ornamentation; and Samara has invested substantial time, capital and talent in designing and creating the Samara clothing and ensuring that all of Samara's clothes conform to that look, in order to indicate that the source of the garments is Samara. Samara has valid, registered copyrights in a number of its appliques and applique designs, including the following registrations for garments that are the subject of this Action: VA 751-717 through VA 751-726; VA 768-792 through VA 768-794; VA 768-826; VA 768-827; VA 768-841; VA 768-842; and VA 720-956.

10. JPI has in inventory at the current time, in the Philippines, approximately 180,000 units (15,000 dozen), but in no event more than 185,000, spring/summer garments that JPI manufactured originally for the spring/summer 1996 season (the "Inventory"). No less than half of the Inventory, but no more than two-thirds of the Inventory, are copies of Samara garments that have been copyrighted and are at issue in this Action.

11. Discovery has commenced in this Action but has not been completed. All parties hereto have served document requests and interrogatories, certain documents have been produced and depositions have been taken of certain of the parties hereto and of Wal-Mart.

Decretal Provisions

1. JPI from this day forward will:

(a) not import into the United States, manufacture or sell any garments of which the appliques, applique combinations, applique placement and/or combination of appliques and fabric, was copied from a Samara garment. However, nothing contained herein shall preclude JPI from using in its garments: (i) seersucker fabric, yokes, collars, pockets, bibs or other such garment features that are part of the construction of a garment and are in the public domain; (ii) appliques from a source or basis other than Samara, or that are in the public domain; (iii) applique combinations or placements from a source or basis other than Samara, or that are in the public domain; or (iv) applique-and-fabric combinations from a source or basis other than Samara, or that are in the public domain;

(b) not design or order any garments (or garment components such as appliques) using any Samara garment; applique, combination of appliques and fabric or applique combination as a source or basis; and

(c) instruct all persons providing garment or applique designs for JPI, whether employees or independent contractors, not to design any garments using any Samara garment, applique, combination of appliques and fabric or applique combination as a source or basis.

2. JPI may sell the Inventory solely for resale in the following locations: Mexico, Canada, Puerto Rico, Guam, China, Central America, South America, the Carribean, India,

Australia, New Zealand and Africa. The Inventory will in no circumstances be sold by JPI for resale in the United States, whether directly or indirectly.

3. The Court shall retain jurisdiction to enforce the provisions of this Consent Order.

Dated: New York, New York
January 14, 1997

PROSKAUER ROSE GOETZ & MENDELSOHN, LLP

By: /s/ Marya Lenn Yee
Marya Lenn Yee (MY-4608)
1585 Broadway
New York, New York 10036
(212) 969-3000

Attorneys for Defendant Judy Philippine, Inc.,

SILLER WILK LLP

By: /s/ Stuart M. Riback
Stuart M. Riback (SR-2443)
747 Third Avenue
New York, New York 10017
(212) 421-2233

Attorneys for Plaintiff Samara Brothers, Inc.

SO ORDERED.

/s/ Hon. Denny Chin
Hon. Denny Chin
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

– against –

JUDY-PHILIPPINE, INC., et al.,
Defendants.

PROPOSED JUDGMENT
SUBMITTED BY PLAINTIFF

CHIN, U.S.D.J.:

This action came on for trial on claims as between plaintiff Samara Brothers, Inc. ("Samara") and defendant Wal-Mart Stores, Inc. ("Wal-Mart") before the Court and a jury, Honorable Denny Chin, United States District Judge, presiding, and the Court having instructed the jury to find a special verdict, and the jury having duly found such verdict, and the Court having considered the evidence and heard argument on the equitable claims in the case, and the Court having rendered a decision on _____, 1997, denying the motion by defendant Wal-Mart for judgment as a matter of law pursuant to Federal Rules of Civil Procedure 50,

IT IS SO ORDERED, ADJUDGED AND DECREED that:

1. Wal-Mart is hereby enjoined from infringing any of the following valid registered copyrights owned by Samara: VA 751-717 through VA 751-726, VA 768-792 and VA 768-793 and VA 768-841. In addition, because of Wal-Mart's wilful infringement as found by the jury, and what the Court has determined to be a continuing danger of infringement of

Samara's rights, including infringement during the Spring/Summer 1997 season, Wal-Mart is hereby enjoined from infringing any other copyright that Samara has registered or may register in the future.

2. There is a danger that Wal-Mart may continue to infringe Wal-Mart's trade dress in the future. Therefore, Wal-Mart is hereby enjoined from infringing the trade dress of Samara, which the jury found to be protectible. Wal-Mart shall not originate, participate in originating, order, manufacturer, contract for, purchase, display, sell, offer or otherwise engage in commerce in (a) the garments displayed in Exhibit 1 hereof, consisting of Plaintiff's Trial Exhibits 1A, 3A, 4A, 4C, 5A, 6A, 8A, 9A, 10A, 32A, 33A, 34A, 36A-R and 37A-N; or (b) any other garments which are likely to cause confusion, mistake or deception as to the source, sponsorship or affiliation with Samara's garments as herein set forth. The trade dress is a complex of features that together create a distinctive overall appearance that is consistent from year to year. That appearance is composed of some or all of the following elements in combination: seersucker fabric, large bold appliques that are usually integrated into the construction of the garment, color coordination of the appliques with the body fabric, use of contrasting collars and yokes, and lack of excess ornamentation. Samara's trade dress is expressed in the following clothing designs, all of which Wal-Mart is hereby enjoined from infringing, whether by copying or by originating, purchasing or selling garments with a confusingly similar appearance likely to cause confusion, mistake or deception as to source, sponsorship or appearance:

(a) a girl's spring/summer garment with a large scalloped collar, with three matching appliques dropped into the edge of the scallop and integrated into the construction of the collar. Garments in the record that are examples of this aspect of Samara's trade dress are

Plaintiff's Exhibits 4A, 4C, 5A, 6A, 8A, 36A-C and 37A-G, photographs of which are annexed hereto;

(b) a girl's spring/summer garment with a split round collar, ric-rac (or other similar bordering material) on the collar parallel to the curve of the collar; an applique set into each side of the facing front, set at or about the level of the ric rac (or other similar bordering material); pockets on the body of the dress with ric rac (or other similar bordering material) parallel to the hem of the pocket; and an applique on each of the pockets that matches or complements the applique on each side of the collar. Garments in the record that are examples of this aspect of Samara's trade dress are Plaintiff's Exhibits 1A, 32A, 36D-F and 37H-K, photographs of which are annexed hereto;

(c) a girl's spring/summer garment with a ruffle sleeve, and either (i) a yoke with three matching appliques and a large complementary applique on the lower front side of the dress body, or (ii) a yoke with a single large applique in the center. Garments in the record that are examples of this aspect of Samara's trade dress are Plaintiffs Exhibits 3A, 36G-J, 36M and 37L-M, photographs of which are annexed hereto;

(d) a girl's spring/summer garment with a round collar designed so that the entire collar has the appearance of a watermelon wedge, and either: (i) if the collar is a solid round collar, a ruffle at the edge of the collar; or (ii) if the collar is a split round collar, ric rac (or other such bordering material) parallel to the edge of the collar, and rounded pockets with ric rac (or other such bordering material) and corresponding watermelon appearance on the pockets. Garments in the record that are examples of this aspect of Samara's trade

dress are Plaintiff's Exhibits 33A, 36K-L and 37N, photographs of which are annexed hereto;

(e) a girl's spring/summer garment bearing a large collar, (either round collar or bishop's collar) with three matching large appliques set into the collar. Garments in the record that are an example of this aspect of Samara's trade dress is Plaintiff's Exhibits 9A and 36N, photographs of which are annexed hereto;

(f) a boy's spring/summer overall-style garment with three matching appliques set into the yoke. Examples of this aspect of Samara's trade dress are Plaintiff's Exhibits 10A, 36D and 36R, photographs of which are annexed hereto; and

(g) a boy's spring/summer overall-style garment with a single large applique placed either (i) in the center of the chest; or (ii) on the lower front of the garment, to the side. Examples of this aspect of Samara's trade dress are Plaintiff's Exhibits 34A, 36P and 36Q, of which photographs are annexed hereto.

3. Samara shall recover of Wal-Mart the following sums:

(a) Wal-Mart's profits in the amount found by the jury of $1,153,315 30;

(b) an enhancement of the award to account for Wal-Mart's profits after July 13, 1996. This enhancement is needed because of the unavailability of proof of such sales in a manner that would have permitted Samara to present such proof to the jury. Because Wal-Mart's sales as of July 13 were approximately 80% of total inventory of infringement garments, the award of profits should be increased by 25% (20 % being 25% of 80%), or $288,329.08;

(c) prejudgment interest in the amount of $_____ as of June 1, 1997, plus interest on the enhanced award in the amount of $_____ as of June 1, 1997. Such interest shall continue to accumulate at a simple interest rate of _____ of the principal amount, until the date hereof, after which postjudgment interest shall commence running. The Court finds that this is an exceptional case warranting the award 3fa prejudgment interest.

(d) because this is an exceptional case and because Wal-Mart was found to have acted wilfully and in bad faith, the Court finds it appropriate to award Samara reasonable attorneys fees and disbursements. The Court has examined Samara's time and disbursement records, finds them reasonable, and based thereon awards Samara $_____ as a reasonable attorneys fees and disbursement, and

(e) Samara's costs in this action.

4. Pursuant to Federal Rule of Civil Procedure 54(b), the Court determines that there is just no reason for delaying the entry of judgment on Samara's claims against Wal-Mart. Accordingly, the Clerk is directed to enter this judgment on all such claims, without regard to the pendency of other claims, counterclaims and/or cross-claims that may remain pending in the action.

ENTER:

_____

Denny Chin, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96-Civ. 5032 (DC)

SAMARA BROTHERS, INC.,
Plaintiff,

– against –

JUDY-PHILIPPINE, INC., et al.,
Defendants.

FILED
JUL 6 1999

JUDGMENT

CHIN, U.S.D.J.:

This action came on for trial on claims as between plaintiff Samara Brothers, Inc. ("Samara") and defendant Wal-Mart Stores, Inc. ("Wal-Mart") before the Court and a jury, and the Court having instructed the jury to find a special verdict, and the jury having duly found such verdict, and the Court having considered the evidence and heard argument on post-trial motions and plaintiff's equitable claims in the case, and the Court having rendered a decision from the bench on July 14, 1997 as well as a written decision dated July 17, 1997 on the post-trial motions,

Wal-Mart having appealed this Court's judgment to the United States Court of Appeals for the Second Circuit (the "Second Circuit"), and the Second Circuit having affirmed in part and reversed in part this Court's judgment pursuant to an

opinion filed December 28k, 1998 and reported at 165 F.3d 120 (2d Cir. 1998); and

Wal-Mart having moved for a rehearing of the appeal by the Second Circuit, with a suggestion for rehearing *en banc*, and the Second Circuit having denied that motion by order filed April 21, 1999; and

The mandate of the Second Circuit having issued to this Court;

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Wal-Mart is hereby enjoined from infringing any of the following valid registered copyrights owned by Samara: VA 751-717 through VA 751-726, VA 768-792 and VA 768-793 and VA 768-841.

2. Wal-Mart is hereby enjoined from infringing any other copyright that Samara has registered or may register in the future.

3. Wal-Mart is hereby enjoined from marketing, advertising, manufacturing, purchasing, importing, selling or otherwise distributing any garments that infringe Samara's trade dress. The trade dress is comprised of an amalgamation of design elements combined in and on the garments, and is reflected in the photocopies annexed as Exhibit 1 (consisting of plaintiff's Trial Exhibits 1A, 3A, 4A, 4C, 5A, 6A, 8A, 9A, 10A, 32A, 33A, 36A-N, 36R and 37A-O). The trade dress includes most if not all of the following elements:

(a) seersucker fabric;

(b) two or three identically shaped and symmetrically placed cloth appliques (not screen printed) substantially similar to appliques displayed on Samara clothing in vibrant colors integrated into

the collar (which is typically large and white), collar line and/or pocket(s) (if any);

(c) single-piece, full-cut bodies; and

(d) the absence of three dimensional features, outlines and words.

Essential to the trade dress is the method by which the design elements are combined on the garments. In particular: (i) the placement of the appliques, typically a row of two or three, along the collar or collar line of the garment, and on any pockets; and (ii) seersucker fabric are essential to the trade dress.

4. Samara shall recover of Wal-Mart the sum of $1,676,955.77, consisting of the following:

(a) Wal-Mart's profits in the amount of $1,084,681.47;

(b) prejudgment interest (through July 17, 1997) in the amount of $115,375.53;

(c) attorneys' fees in the amount of $275,000 and costs in the amount of $33,196;

(d) post-judgment interest on the foregoing total of $1,508,253 in the amount of $163,406.89 through June 10, 1999, in the amount of $5,335.88 for the period from June 11, 1999 through July 2, 1999, with interest continuing to accrue at the rate of $242.54 per day through July 17, 1999, and $256.01 per day thereafter, until paid; and

(e) Samara's costs on the appeal in the amount of $725.35.

SO ORDERED.

Dated: New York, New York
July 2, 1999

/s/ Denny Chin
DENNY CHIN
United States District Judge

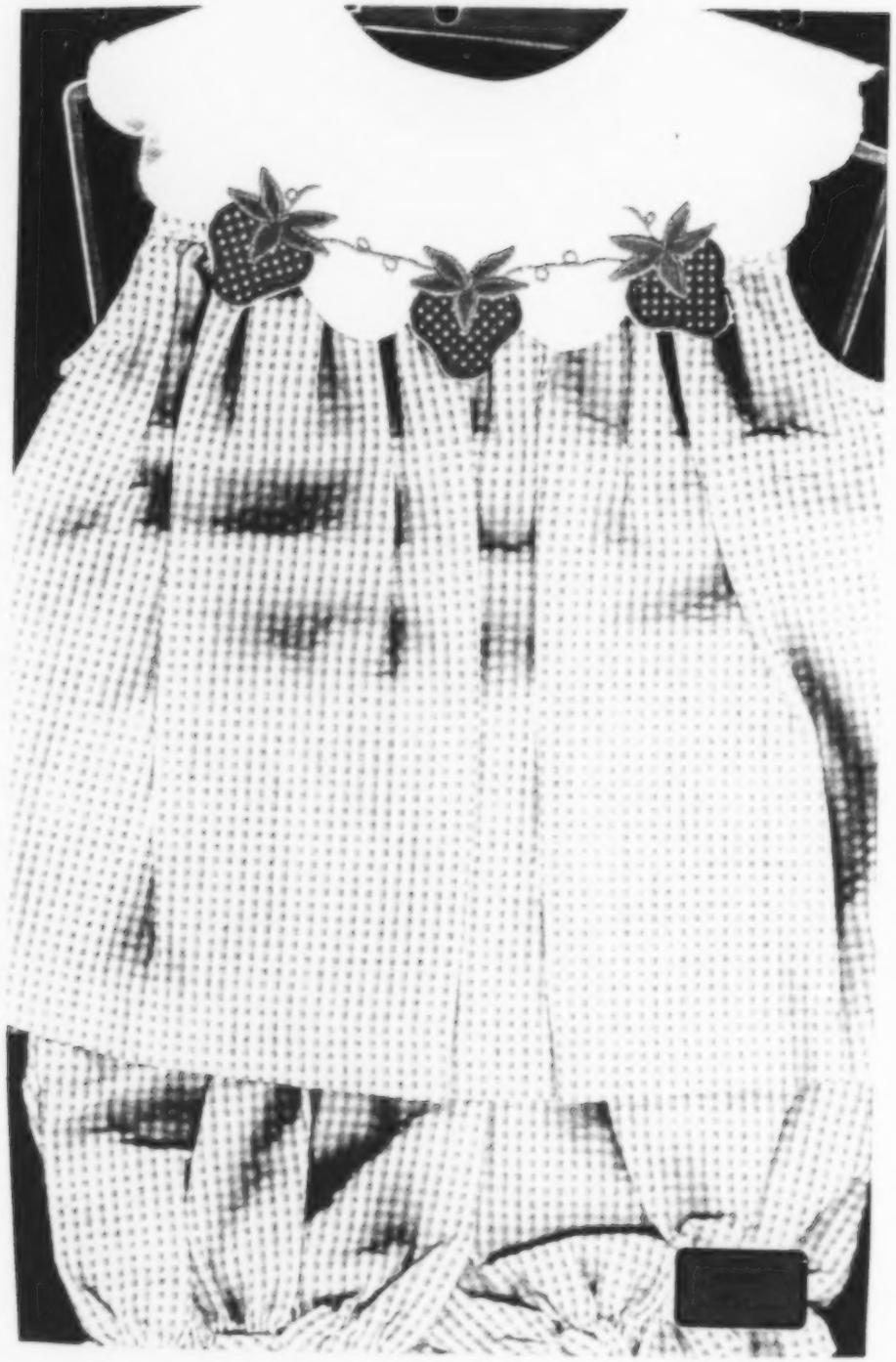
THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 7-7-99

Plaintiff's Exhibit 1A

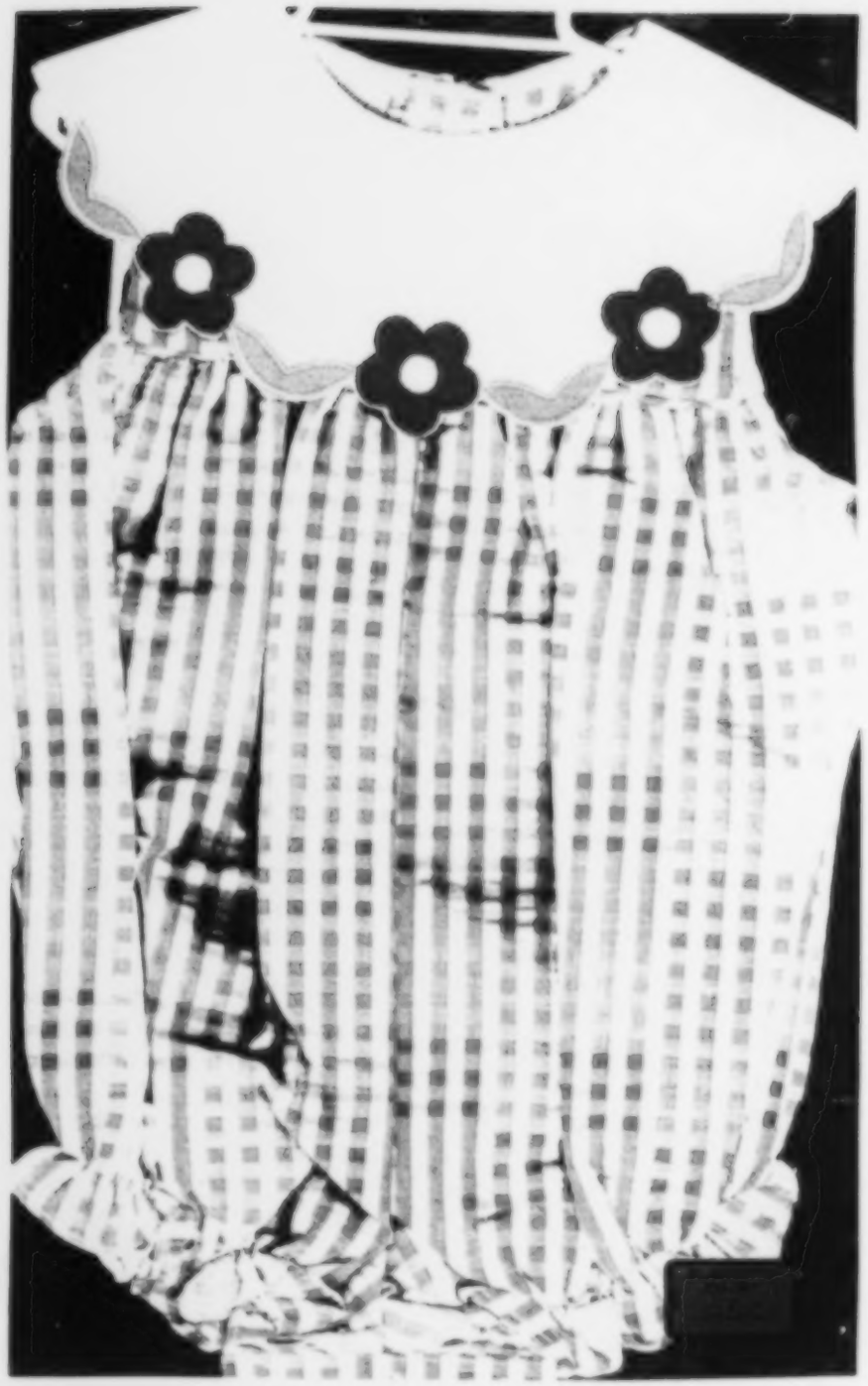
Plaintiff's Exhibit 3A

Plaintiff's Exhibit 4A

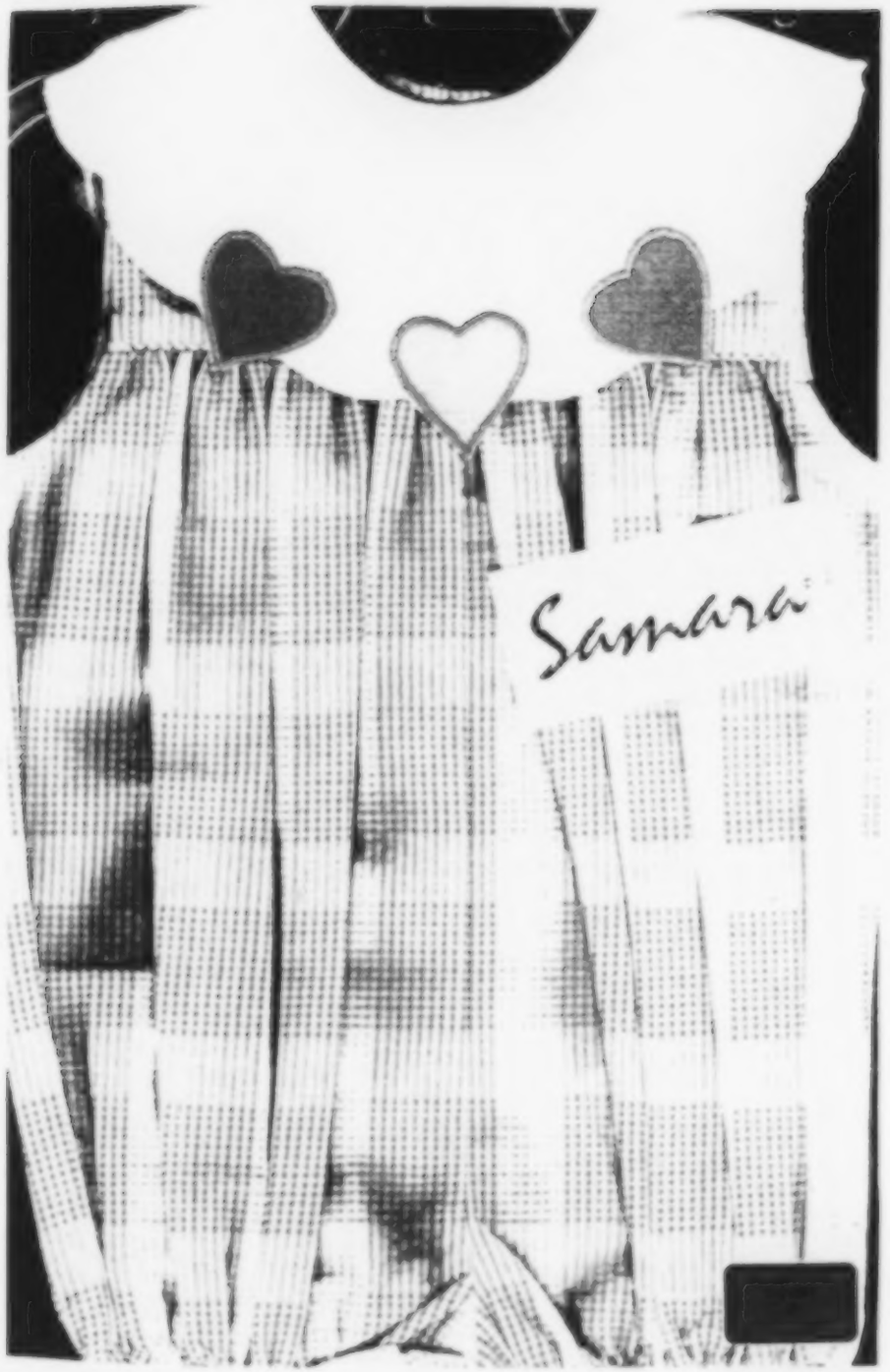
Plaintiff's Exhibit 4C



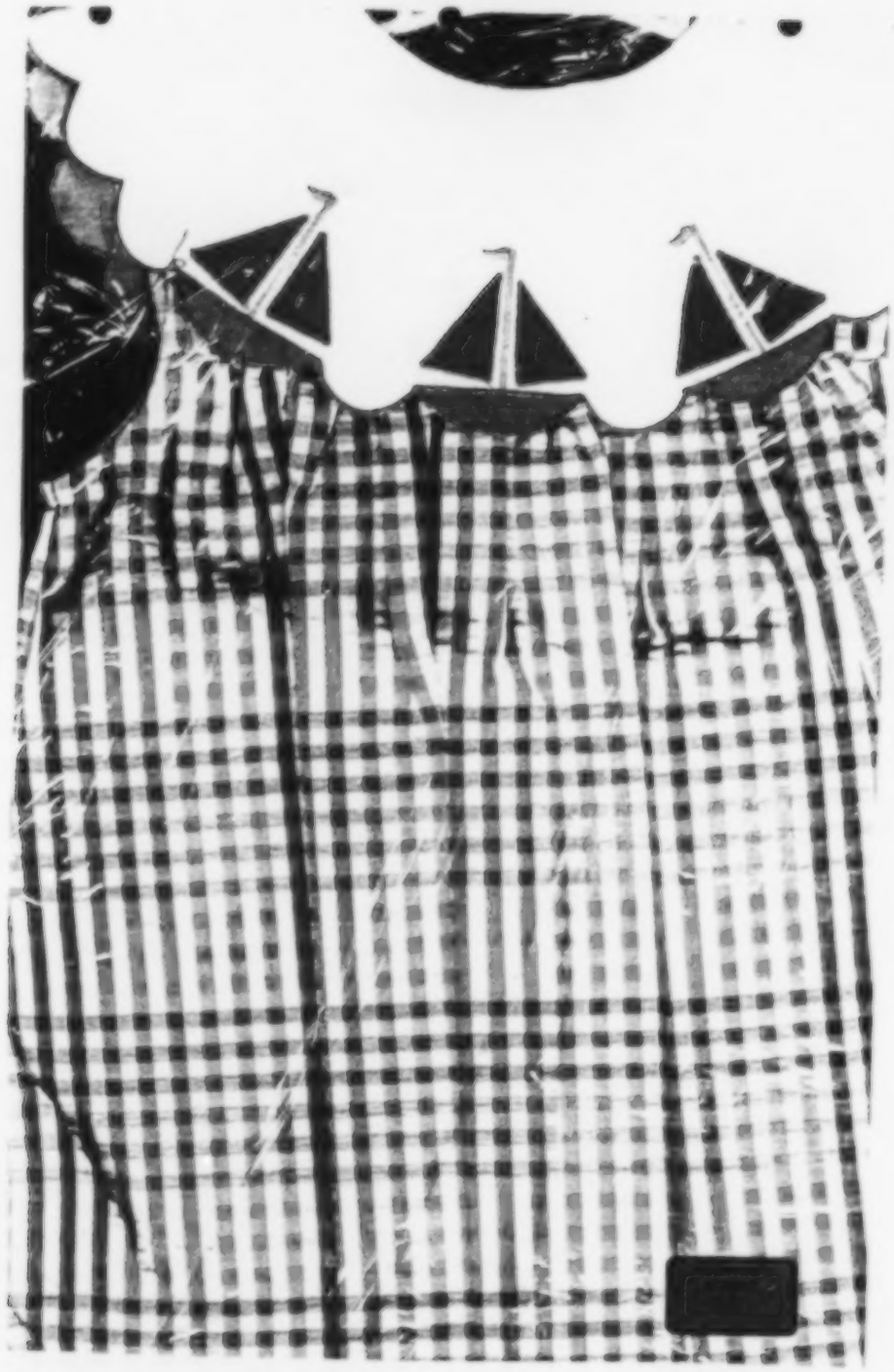
Plaintiff's Exhibit 5A



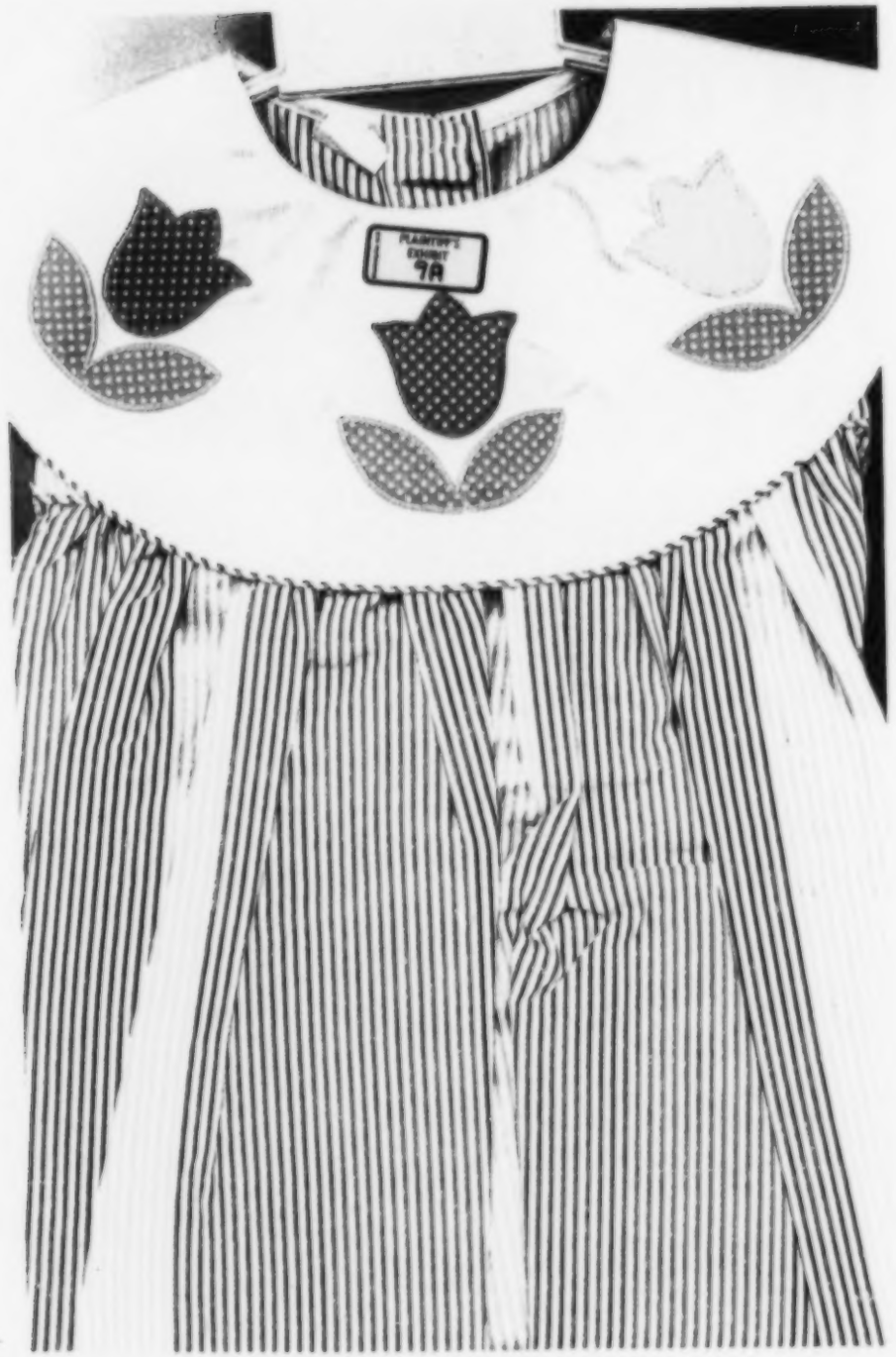
Plaintiff's Exhibit 6A



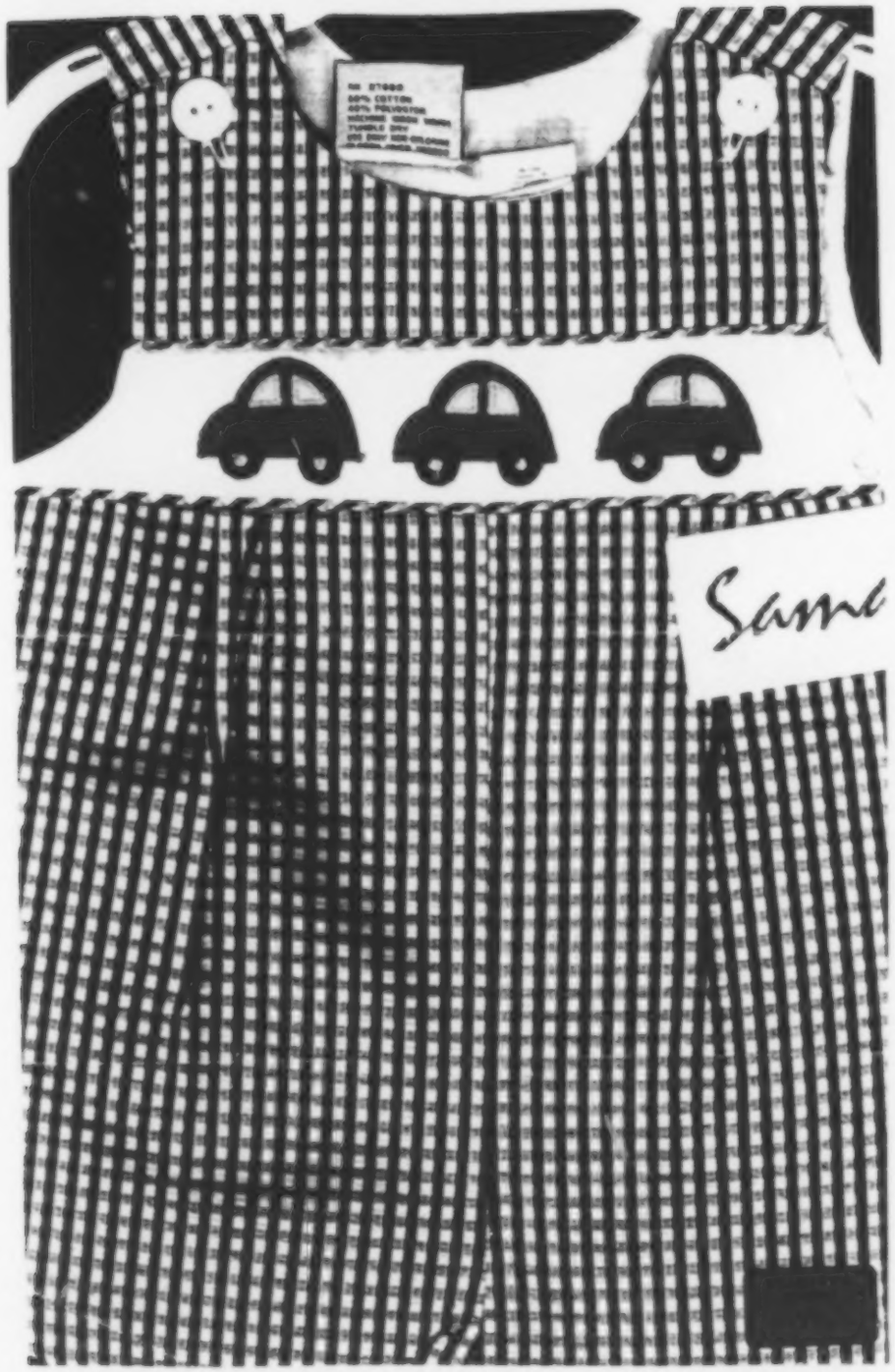
Plaintiff's Exhibit 8A



Plaintiff's Exhibit 9A



Plaintiff's Exhibit 10A

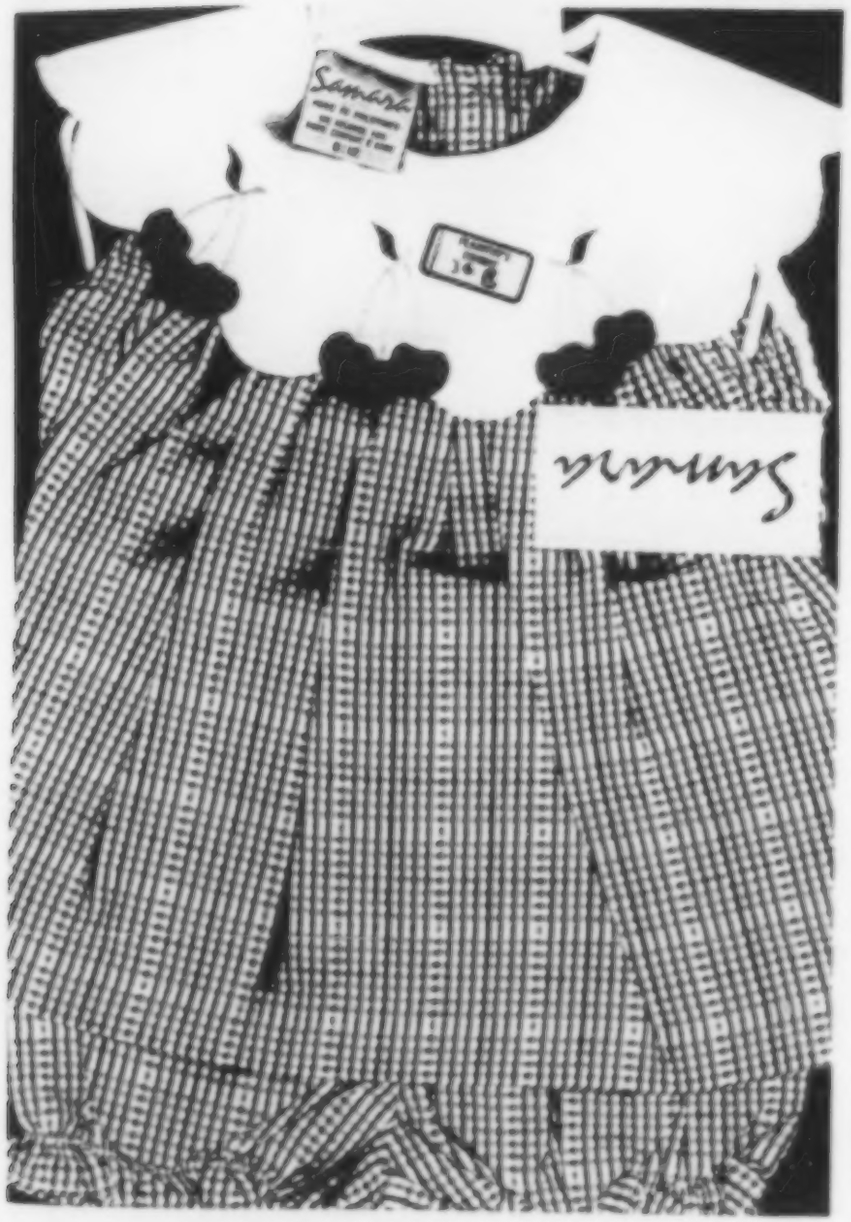


Plaintiff's Exhibit 32A

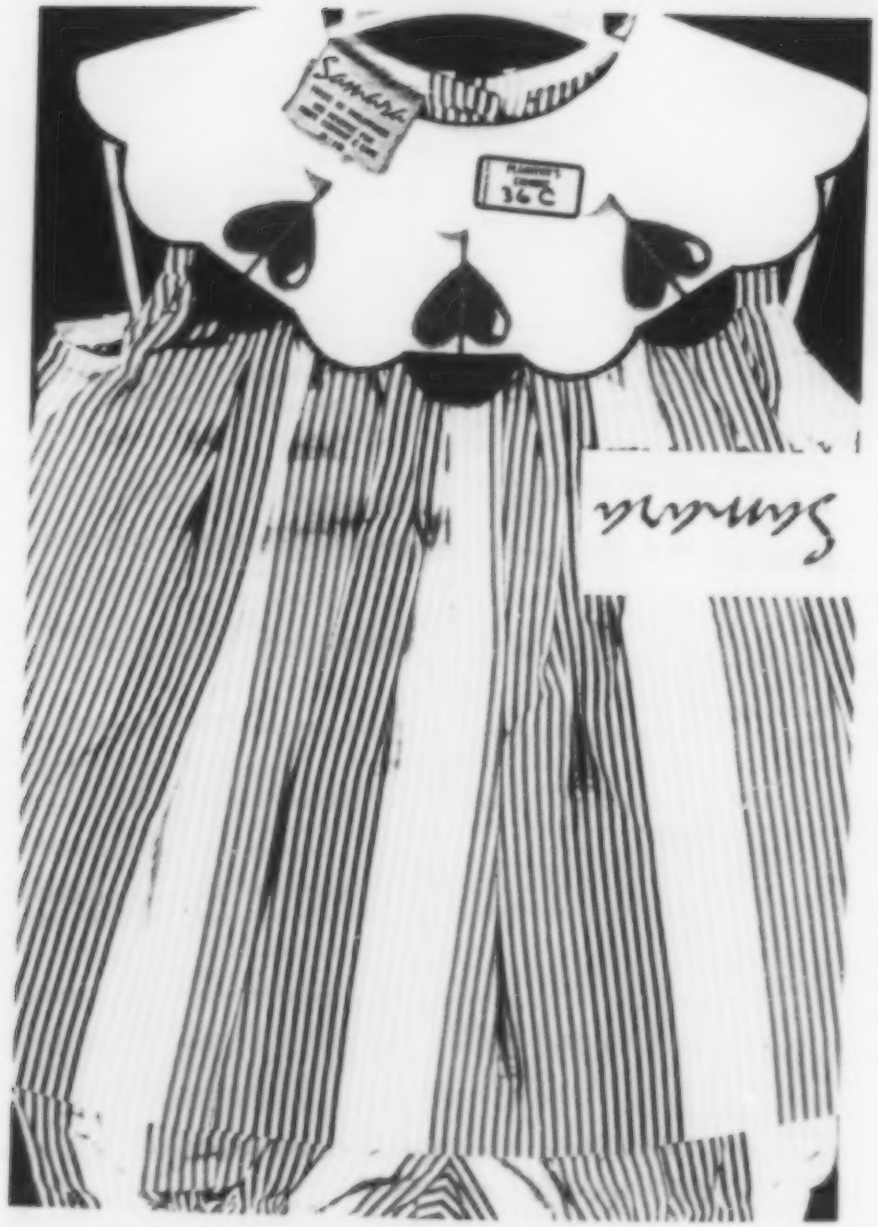
Plaintiff's Exhibit 33A

Plaintiff's Exhibit 36A

Plaintiff's Exhibit 36B

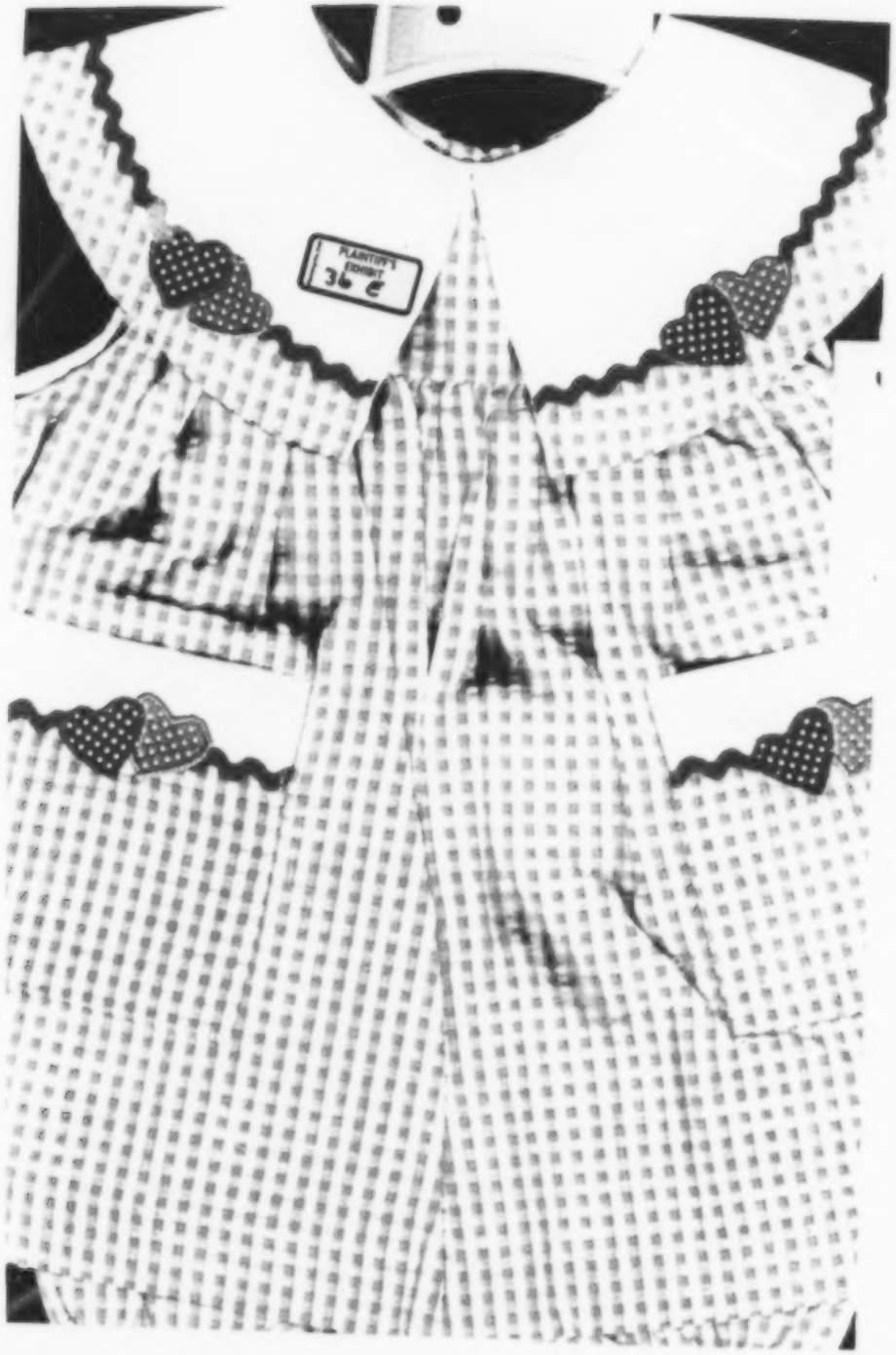


Plaintiff's Exhibit 36C

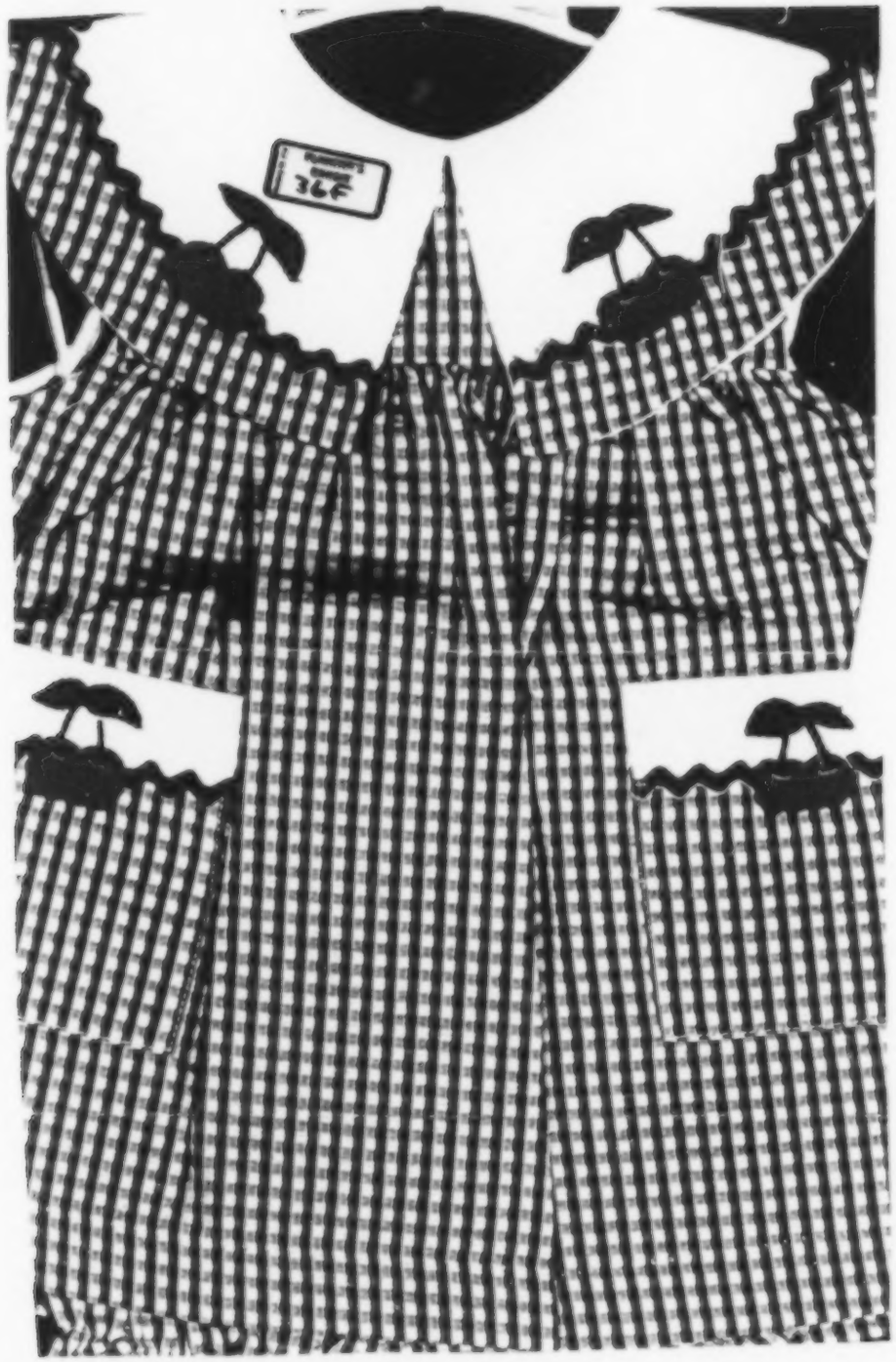


Plaintiff's Exhibit 36D

Plaintiff's Exhibit 36E



Plaintiff's Exhibit 36F



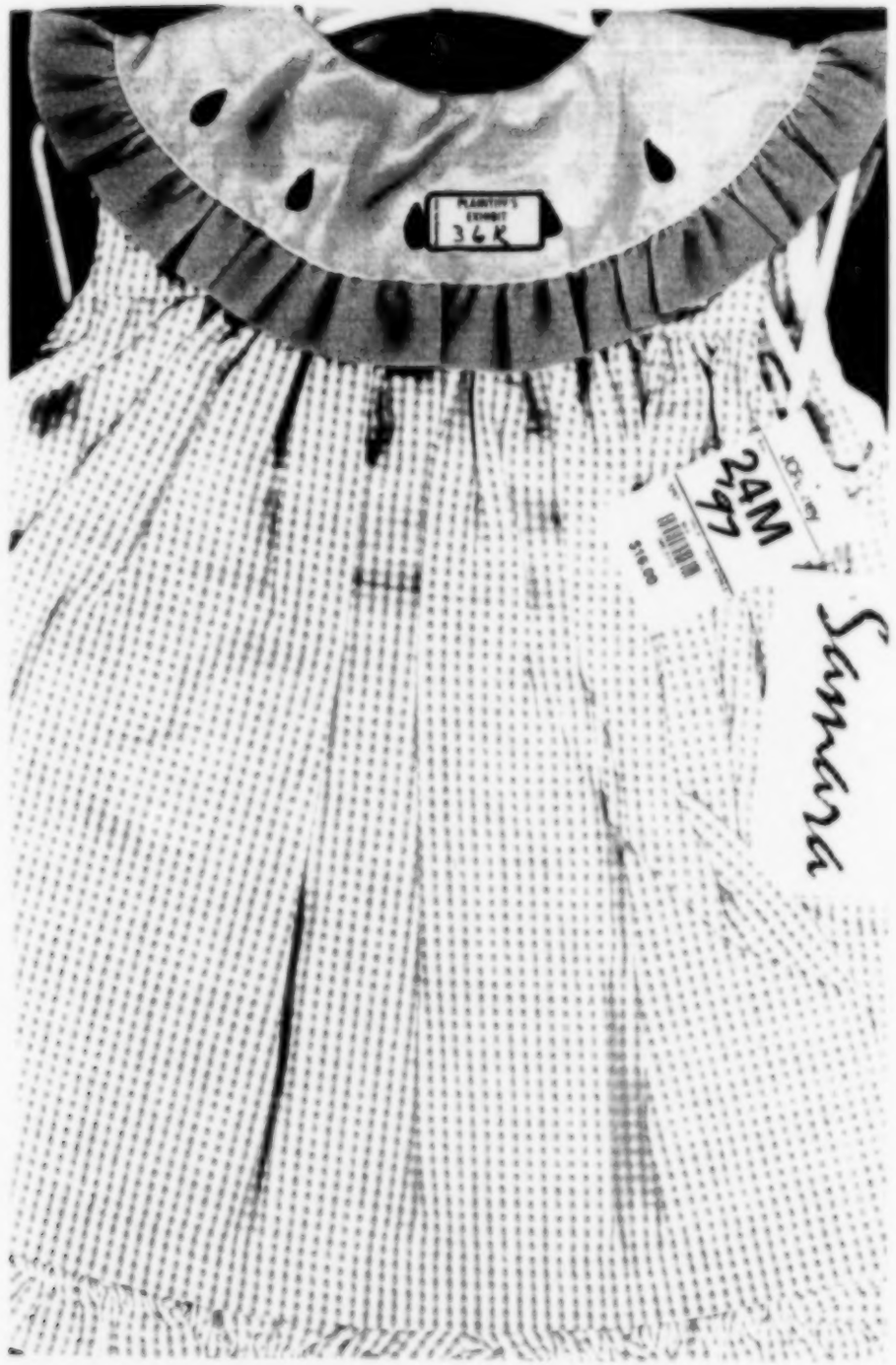
Plaintiff's Exhibit 36G

Plaintiff's Exhibit 36H

Plaintiff's Exhibit 36I

Plaintiff's Exhibit 36J

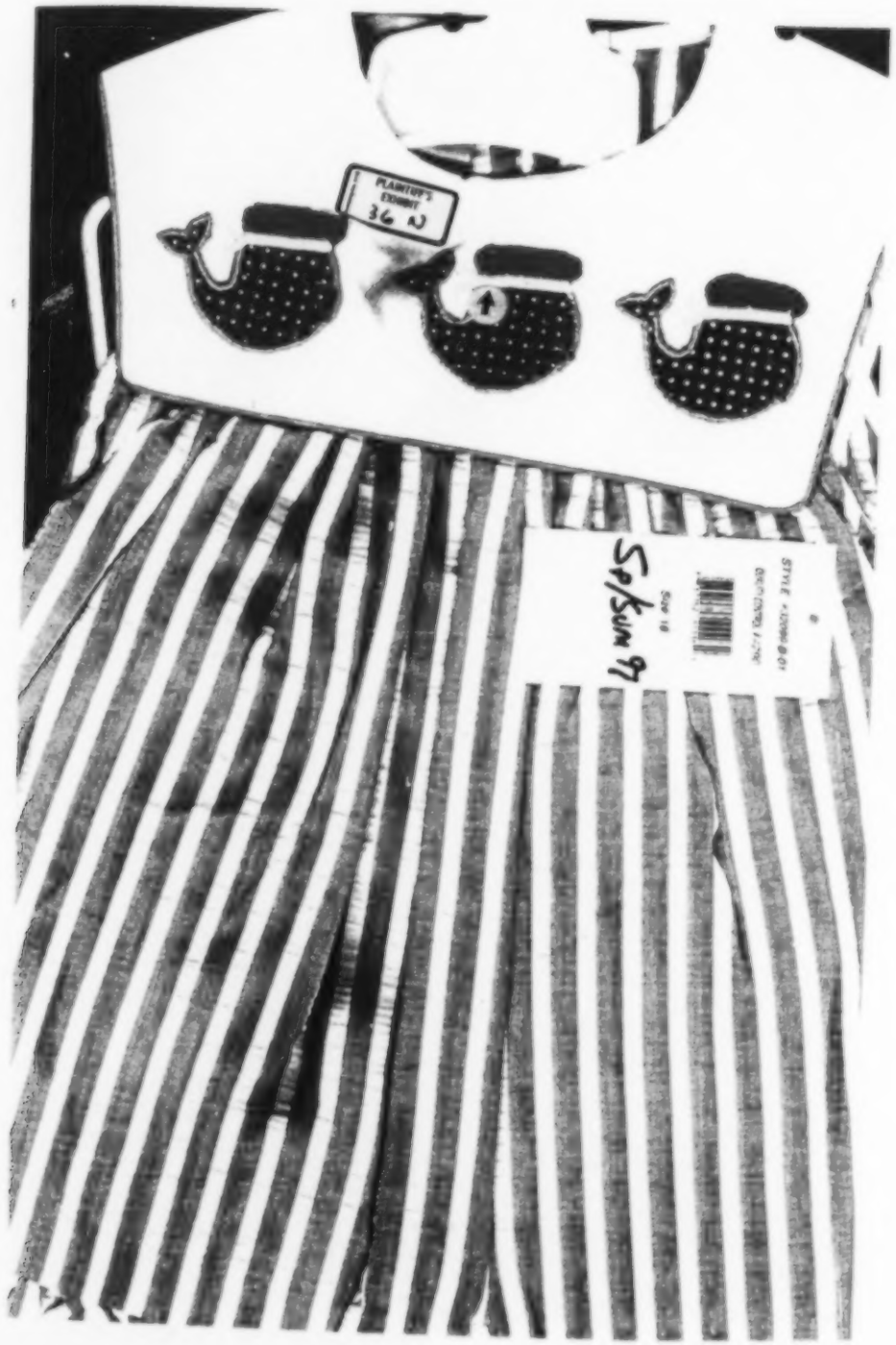
Plaintiff's Exhibit 36K



Plaintiff's Exhibit 36L

Plaintiff's Exhibit 36M

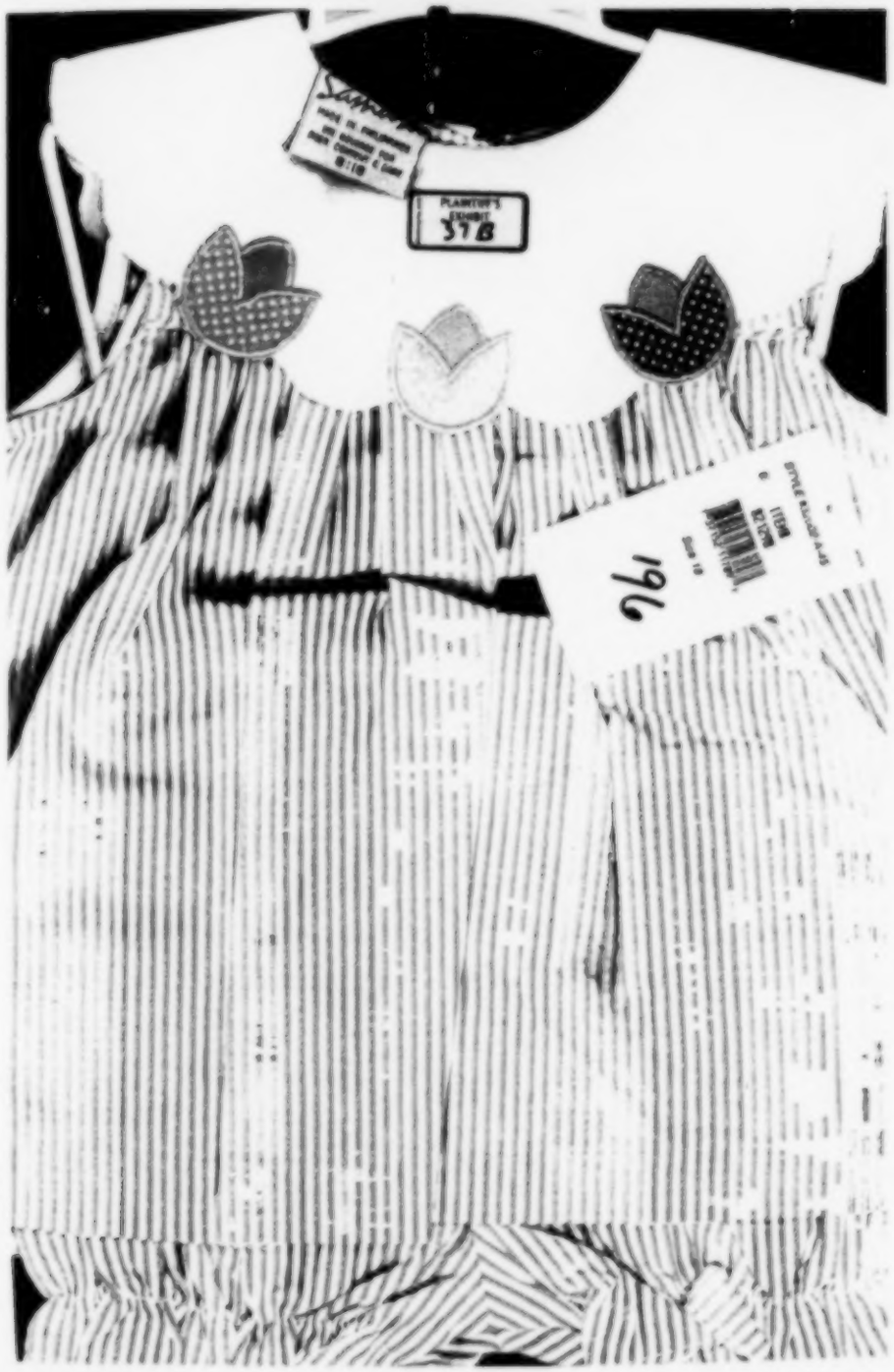
Plaintiff's Exhibit 36N



Plaintiff's Exhibit 36R

Plaintiff's Exhibit 37A

Plaintiff's Exhibit 37B

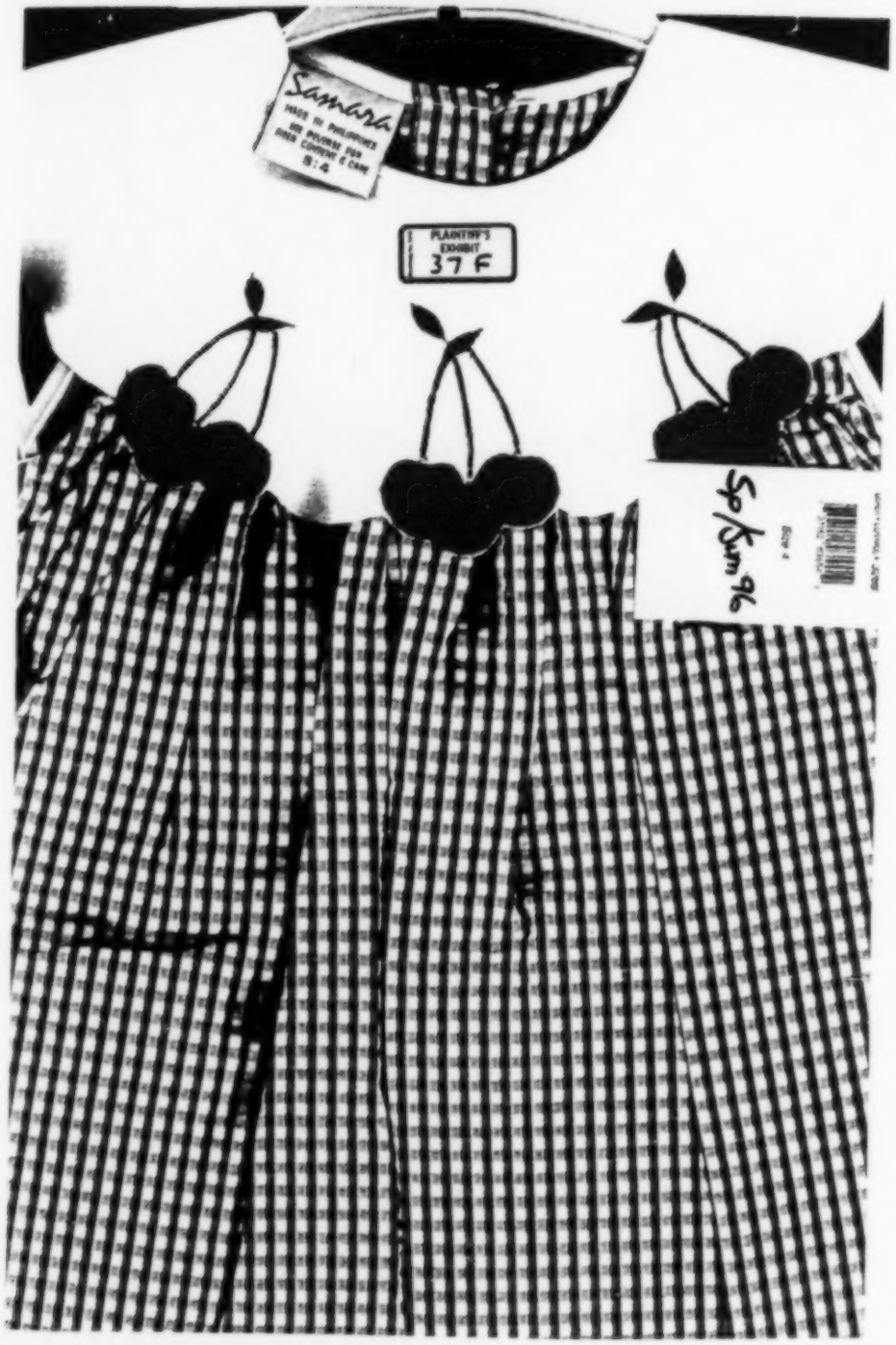


Plaintiff's Exhibit 37C

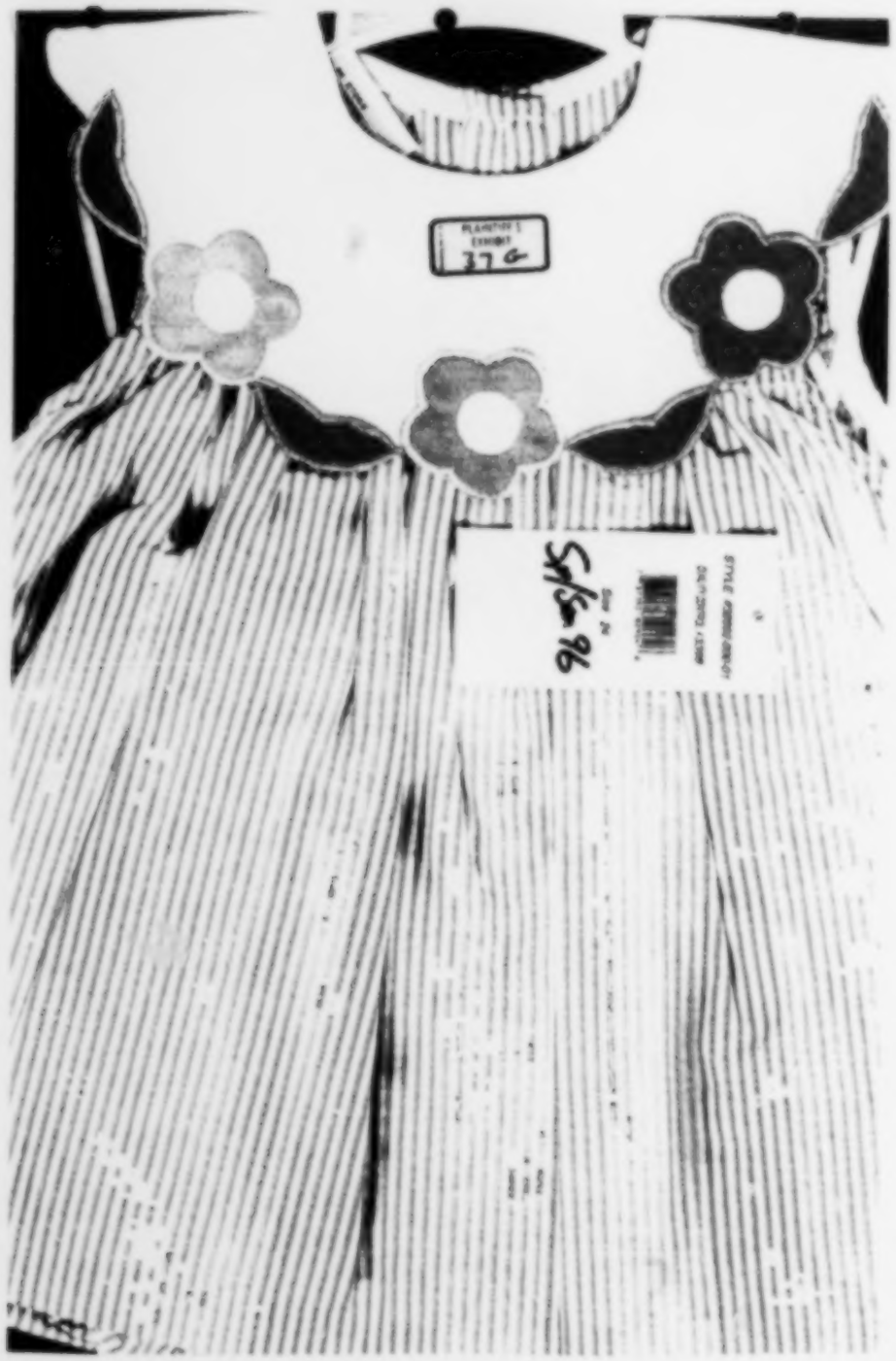
Plaintiff's Exhibit 37D

Plaintiff's Exhibit 37E

Plaintiff's Exhibit 37F



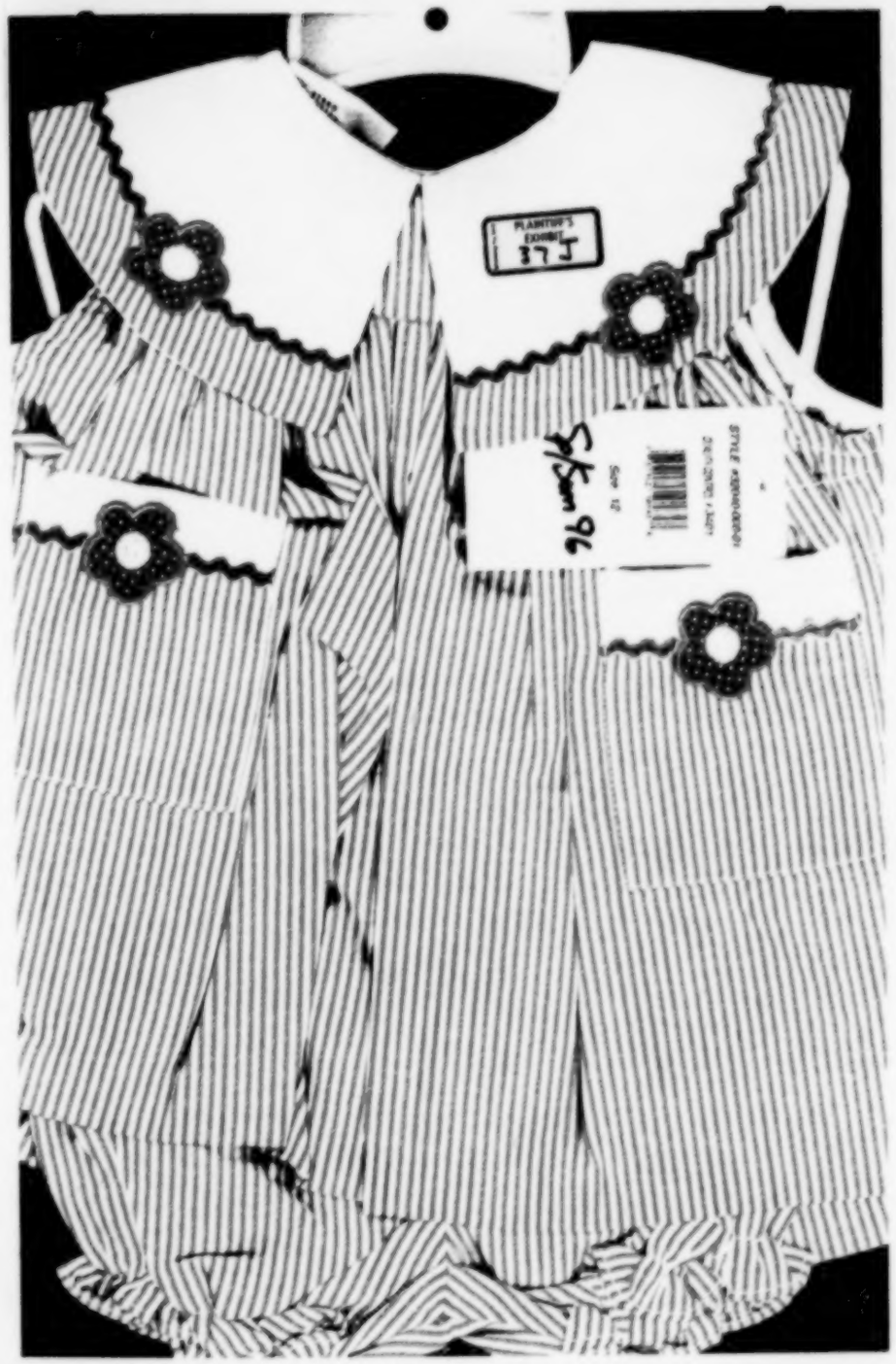
Plaintiff's Exhibit 37G



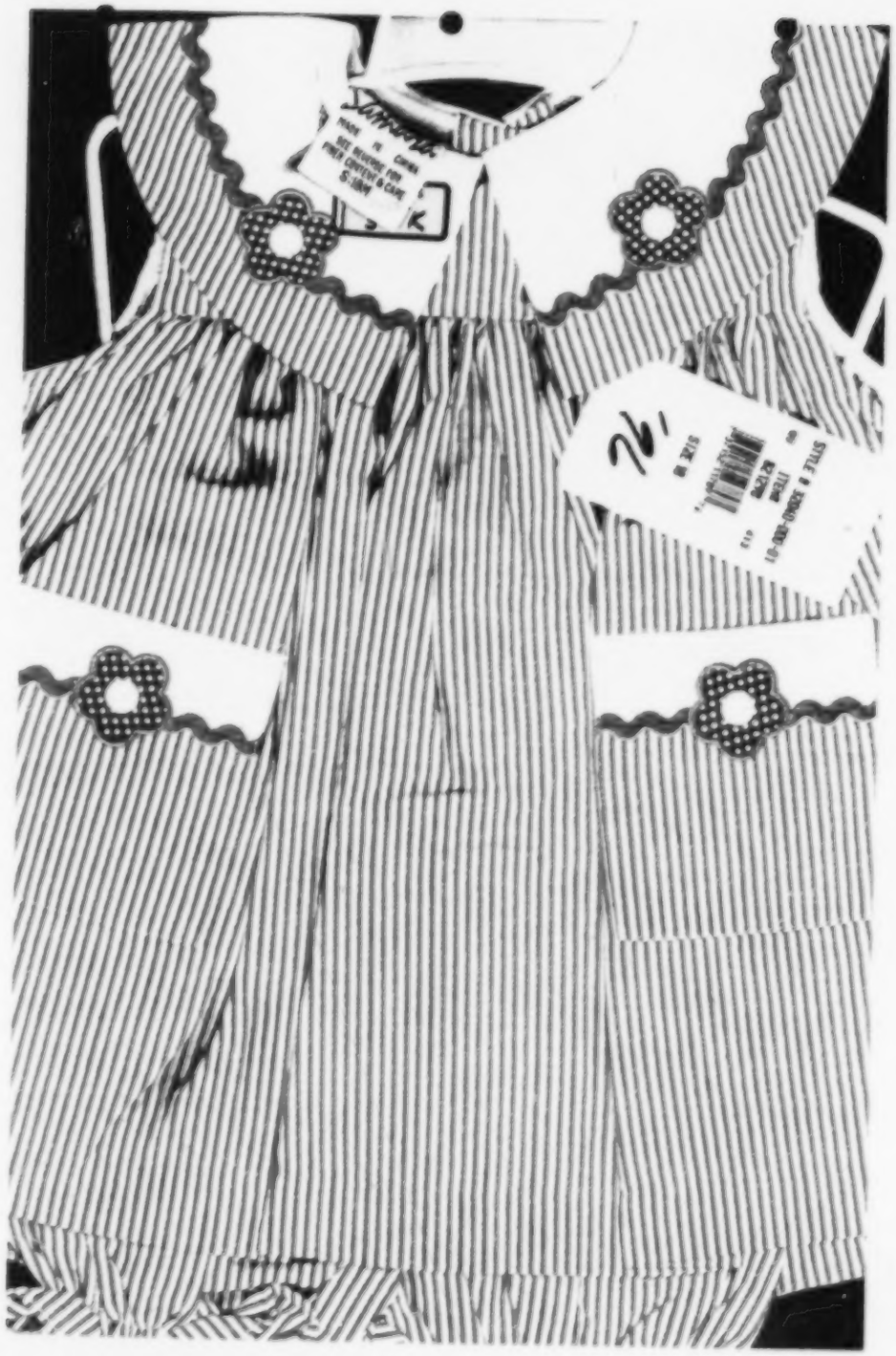
Plaintiff's Exhibit 37H

Plaintiff's Exhibit 37I

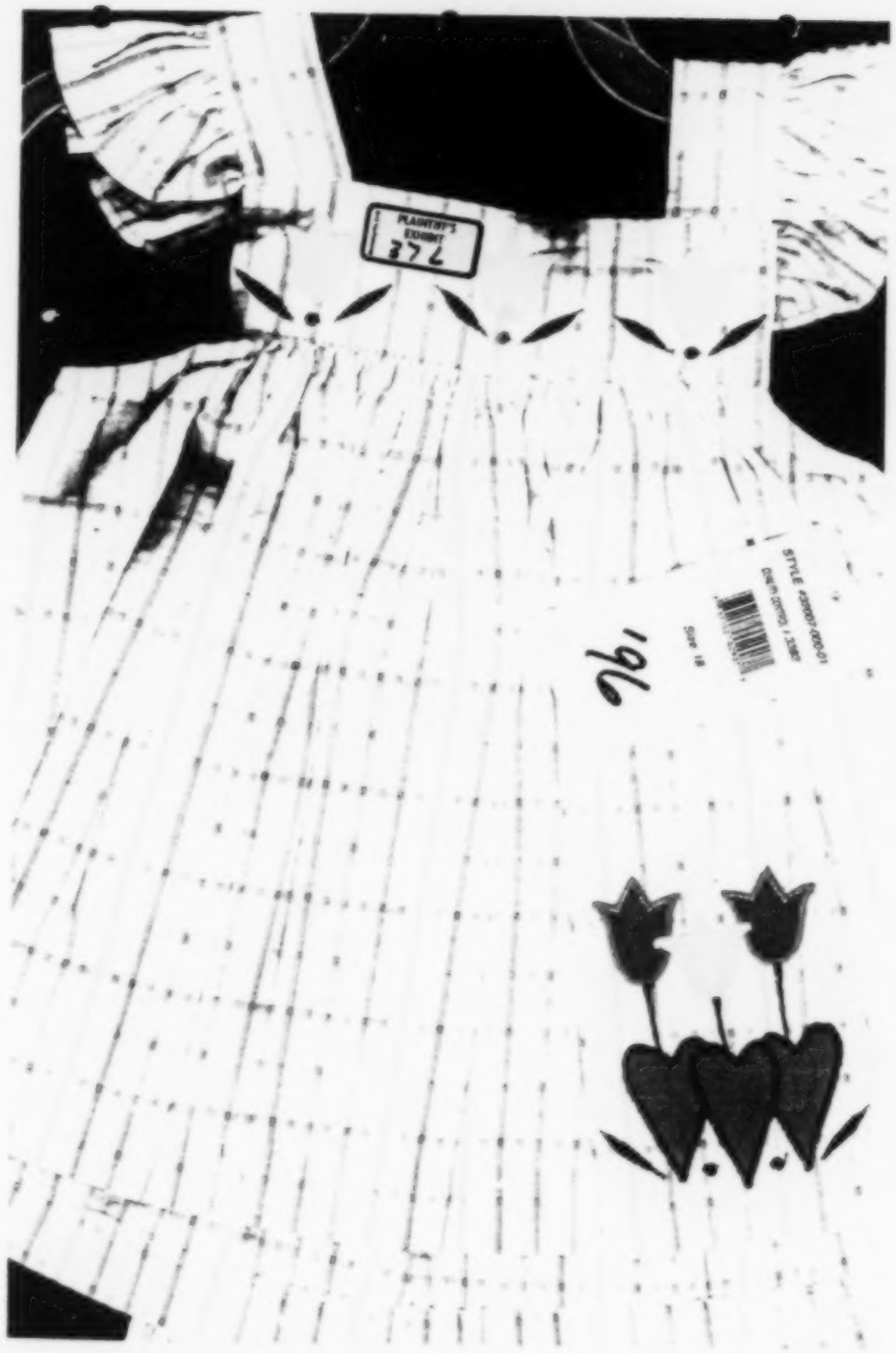
Plaintiff's Exhibit 37J



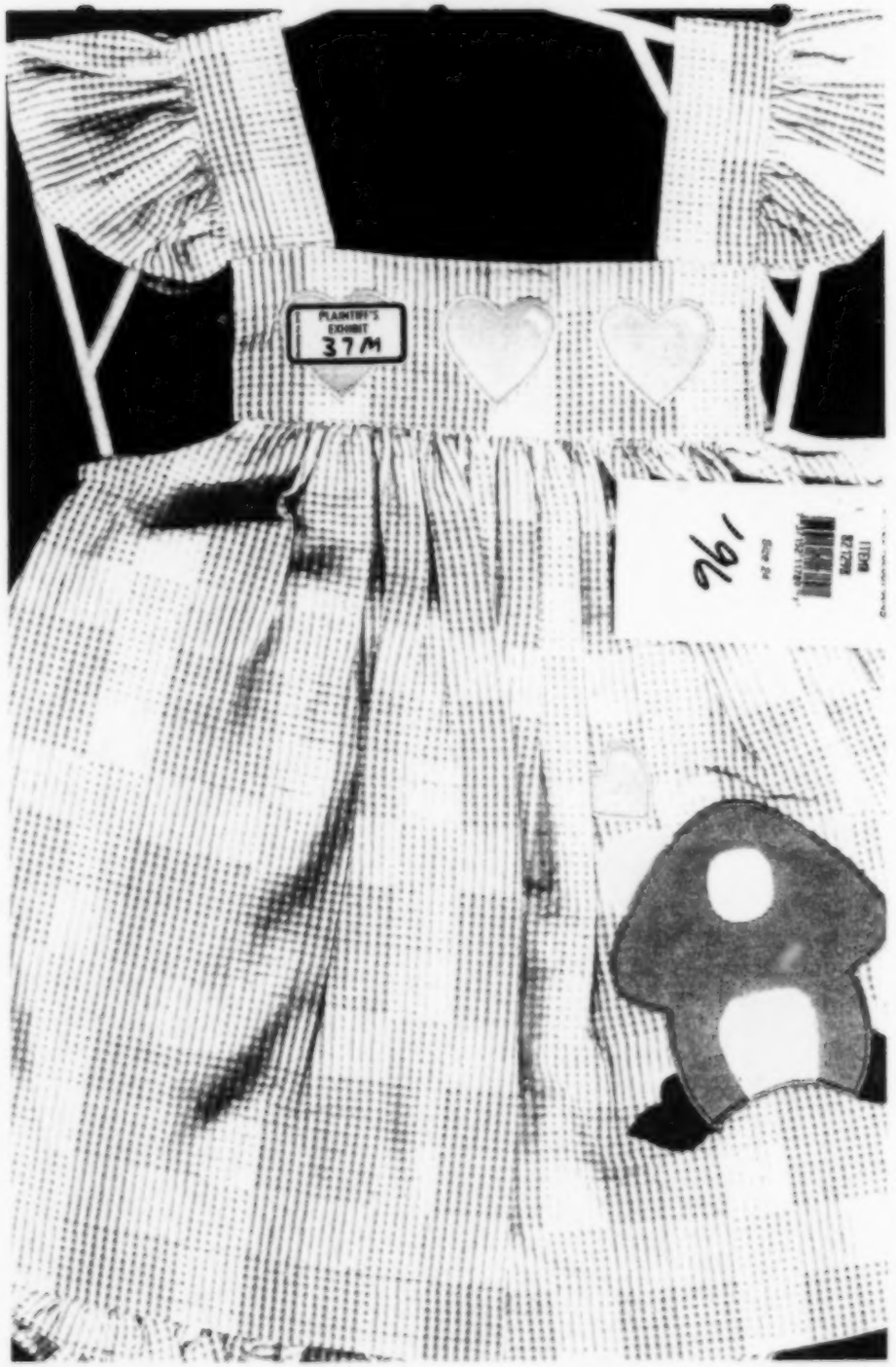
Plaintiff's Exhibit 37K



Plaintiff's Exhibit 37L



Plaintiff's Exhibit 37M



Plaintiff's Exhibit 37N

Plaintiff's Exhibit 37O

VENABLE, BAETJER, HOWARD & CIVILETTI, LLP
Including professional corporations

[Letterhead omitted in printing]

October 7, 1999

The Honorable Gregory W. Carman
Chief Judge
United States Court of International Trade
One Federal Plaza
New York, New, York 10278-0001

Re: *Samara Brothers, Inc. v. Wal-Mart Stores, Inc.*
Court Nos. 97-7933 (L); 97-9003 (Con)

Dear Judge Carman:

Thank you for your letter of September 17, 1999, advising us of your discovery concerning your wife's ownership of stock in Wal-Mart Stores, Inc. I have spoken to my client, Wal-Mart Stores, Inc., and they have advised me to take no action concerning your prior involvement in their case. For your information, the Supreme Court granted Wal-Mart's petition for a writ of certiorari on Monday, October 4, 1999.

Very truly yours,
/s/ William D. Coston
William D. Coston

WDC/mmcm
cc: Stuart M. Riback, Esq.
Chief Judge Ralph K. Winter, Jr., Second Circuit Court of Appeals
Circuit Judge Fred I. Parker, Second Circuit Court of Appeals
Senior Circuit Judge Jon O. Newman, Second Circiuit Court of Appeals